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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ADMIRALTY;
COMMENCING WITH THE
JUDGMENTS
OF
THE RIGHT HON. SIR WILLIAM SCOTT,
Michaelmas Term 1798.

By CHR. ROBINSON, LL.D. ADVOCATE.

VOLUME THE SECOND.

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Page 283. line 11. *dele* not.

338. — penult. *for* did read did not exist.

ERRATA IN VOL. II.

- Page 17. line 5 from bottom, *after the word allegation use a comma instead of a full point*
22. — 11. *before meaning, insert literal*
31. — 15. *after chace, insert or at any period of it*
42. — 8. *dele whole*
91. — *penult. for Busnac read Busnah*
135. — 25. *for " whilst there was neither war nor prospect of war," read " without any attention to the event of a war"*
163. — 26. *for or read and*
174. — — *for Peschie, } read Peschier*
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180. — 17. *after persons insert private merchants*
193. — 4 from bottom, *for Vernagling, read Verwagting*
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of the cargo, it being claimed as the property of Fabritius and Wever, the Court

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was more particularly induced to make this order by the special application which had been made on the part of the claimant to show this very gentleman to be examined, as a person who was acquainted with every part of the transaction and who could give the Court the most satisfactory information upon every circumstance.

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The Court the most satisfactory information upon every circumstance. To the purpose of the Court this gentleman has now laid in his

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&c. &c. &c.

actual shipment of the cargo to Mr. Fabritius, with whom he had not come to any final settlement before he left that place. It is worthy of notice that, although Mr. Fabritius was the actual shipper, his name does not appear in any one of the bills of lading.

THE EENROM, FRONTIER MASTER.

May 21st, 1799.

THIS was a case of a ship and cargo taken on a voyage from *Batavia* to *Copenhagen*, December 27, 1798, by his Majesty's ship the *Brilliant*.

Trade of neutrals with the colony of the enemy. Effect of covering enemy's property, by neutral merchants, with regard to other goods belonging to them, in the same case.

JUDGMENT.

Sir William Scott.—In this case the ship is claimed as the entire property of Messieurs *Fabritius* and *Wever* of *Copenhagen*; and half the cargo also is claimed as belonging to them, by Mr. *Fabritius* the son, being employed as supercargo on board this vessel.

The Court directed that this gentleman should give some account of the property of the remainder

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of the cargo; it being claimed "as the undivided property of *Fabritius* and *others*," he was called upon to specify who were the copartners: The Court was more particularly induced to make this order, by the special application which had been made on the part of the claimant to allow this very gentleman to be examined, as a person who was acquainted with every particle of the transaction, and who could give the Court the most satisfactory information upon every circumstance belonging to it. To the surprise of the Court this gentleman has now said in his affidavit, "that he cannot set forth the specific interests, except as hereafter mentioned, as he was sick and confined at *Batavia*, and obliged to entrust the actual shipment of the cargo to Mr. *Inglehart*, with whom he had not come to any final settlement before he left that place." It is worthy of notice that, although Mr. *Inglehart* was the actual shipper, his name does not appear in any one of the ship's papers, although it has happened to peep out since in several other cases. It is, I think, on the face of this excuse, an extraordinary circumstance, that a person employed as supercargo in a foreign country, (who must necessarily be required to give an account of all his transactions to his principals,) falling, from illness, under the necessity of executing his trust by an agent, should not, immediately on his recovery, put himself in possession of everything that had been done for him by his substituted agent during his confinement; this is surely no more than what every agent, in such a situation, would naturally have done: Mr. *Fabritius* says "he did not;"—"but knowing that the funds arising from the outward cargo of this vessel, and

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and from the profits of her voyage to *Cbina*, as far as they were applied to the present cargo, were not equal to more than a moiety; and also learning in *England* that Messrs. *Fabritius* and *Wever* had caused insurance to be made here to the amount of about half of this cargo, he is led to believe that not more than a moiety belongs to these gentlemen." The Court cannot forget that in a very late case, the *Denmark*, this very outward cargo of the *Eenrom* was represented as overflowing the capacity of her return, and as being employed in purchasing a large ship over and above that returned cargo. It now however appears that it was not equal to a moiety of the returned cargo; the other moiety, Mr. *Fabritius* says, "he supposes to have belonged to Mr. *Inglehart*, or to some person for whom he acted:" he says, indeed, that Mr. *Inglehart* told him it belonged to him; but whether in his own right or as agent he cannot say: "but from hearing on his return to *England* that *Marshall Blucker* had caused an insurance to be made here on a part distinct from Messrs. *Fabritius* and *Wever*, he is induced to think that some part belongs to him."

This leads me to dispose of this part of the case; the interest of Mr. *Blucker*, first, Mr. *Cowie* states in his affidavit "that he received orders (he does not say from whom) in *May* 1798 to insure for *Marshall Blucker*, in the *Eenrom*, one thousand two hundred pounds on ship and cargo; and that he believes him to be interested to that amount:"—it appeared to the Court to be an extraordinary circumstance that the insurance should be made in these terms, on ship and cargo, for a person who was not suggested to have

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any interest in the ship; and the explanation was, that *Marshall Blucker* not being a mercantile man, might have fallen into this error inadvertently: I should rather have thought that such an expression, deviating from common speech, was more like the phrase of a person speaking in technical language, than of a person ignorant of trade, and writing simply from his own apprehension of his own concerns; and more especially since I learn, on reference to the merchants, that it is mercantile language, and that such an insurance, though including ship and cargo, is allowed to apply solely to an interest of that amount in the cargo, if the party had an interest in the cargo to that amount, and no interest in the ship. Mr. *Cowie* states farther, "that he has written for instructions," but does not say when. This ship was brought in, in *January 1799*: as a careful and diligent agent he must have taken the first opportunity of giving intelligence of the capture: But it is not said what answer was received, nor is it even said that Mr. *Cowie* expects directions to claim; no paper on board expresses the name of Mr. *Blucker*, and he is perfectly quiescent, and, as far as appears, ignorant of the matter; therefore on the whole I think this is not such a claim as I can admit under the circumstances in which it is introduced: if *Marshall Blucker* has any real interest in this cargo, he may still claim it elsewhere, in the Court of Appeal.

There is another claim that I will also dispose of before I come to the consideration of the ship and cargo. It is a claim of Mr. *Fabritius* the supercargo, for some bills of exchange asserted to have been given for money borrowed for the repairs of the ship, and purchased

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purchased afterwards on his own account from the person in whose favor he had originally drawn them: these are pressed as regular bottomree bonds. It is not a little extraordinary that Mr. *Fabritius*, having such full power over the whole concern as supercargo, should resort to this mode of raising money; but it is only necessary to look at the papers produced to see whether they are of that species of instruments which, in maritime law, will constitute a lien on the ship. If I should think that they are not of that description it will not be necessary to enter into the question, Whether a claim can be given on account of a mere lien on a captured ship? though I am of opinion, for the moment, that it is not such an interest as is regarded and protected by the prize-law. Now, looking at these bills, I am rather inclined to think that they are not of that kind which the maritime law supports as hypothecation bonds; there is no binding of the vessel, no hypothecation whatever; they are mere bills of exchange, stating something about repairs indeed, but in no sense bearing the binding force of bottomree bonds. In the most liberal way in which they can be considered, and with the least scrupulous adherence to form that is consistent with substantial reasoning, I cannot hold them to be maritime bottomree bonds, and I reject the claim founded on them.

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I come now to the consideration of the ship and cargo; or rather, I shall invert the order, and consider the cargo first: The outward cargo of this voyage consisted of tar, sheathing copper, sail cloth, and other articles, which by treaty this country and *Denmark* are expressly forbidden to carry to the enemy of the

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other; it sets out therefore with a violation of public treaties, and of the private law of *Denmark*; because every treaty is a part of the private law of the country which has entered into that treaty, and is as binding on the subjects as any part of their municipal laws; the clearance was general to the *East Indies*, though in some papers a destination to *Fredericksnagore* is held out: with respect to these general clearances to the *East* or *West Indies*, I cannot say that they are absolutely and necessarily illegal, although they are certainly inconvenient to all Parties, by throwing a great uncertainty on the nature of the intended voyage: if neutral governments permit these indefinite clearances which seem to allow a destination to the ports of a belligerent, (if such belligerent has any ports in the *East* or *West Indies*,) it seems proper at least that the nature of the cargo should correspond, and care should be taken that the cargo should be such as their subjects are allowed to carry to an enemy's port; there should be an affidavit, as in voyages to an enemy's port, that the cargo contains no prohibited goods; for without some precaution of this kind great frauds may be committed against the public treaties of the country, and the country may be involved in the consequences of such frauds. There seems to have been no such security taken in this case, and therefore I am inclined to think that there must have been some understanding on this subject at *Copenhagen*, that the voyage was to be to their own ports, or to neutral ports only; for it is not to be imagined that such a general clearance could have been obtained for articles of this description, being understood to have a liberty of going to an enemy's port; such a thing cannot be supposed,

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supposed, without imputing to the *Danish* government, such a connivance at the irregular and illegal conduct of its subjects, as I am in no degree disposed to surmise. The fact, however, is asserted to be, that this vessel left *Copenhagen* with these noxious articles on board, and with full liberty of going to any port; that there was any other destination than to *Batavia* is not suggested by any one circumstance in the cause, therefore we may describe it to have been a voyage not contingent, nor left optional, but clear and certain, and definite, in direct violation of public treaties, and of the law of *Denmark*, founded on those treaties.

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These are circumstances *in limine*, and this is the manner in which the voyage sets out; the next circumstance on which I shall observe is, that the management of this whole affair seems to have been committed to Mr. *Fabritius* jun. and that he acted with unlimited controul, although he is scarcely mentioned in the papers; only in a corner of the instructions given to the master, who was to conduct every thing; Mr. *Ponsaing*, who was master of the outward voyage, is directed to go to *Fredericksnagore* and manage every thing; but in a note "*Ponsaing and the supercargo* are directed to dispose of the cargo and to invest another in the best manner they might be able;" this is the only manner in which Mr. *Fabritius* is mentioned, in a character merely *assistendo*, although he now appears to have been intrusted with unlimited power over the whole business.

The instructions farther direct, "that if the cargo should not be sufficient for the returned voyage, other

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goods might be taken on freight, with a condition that they should be consigned to Messieurs *Fabritius* and *Wever*:" This is not like an authority to buy a cargo in undivided moieties for these gentlemen, and other persons; there are no directions for a partnership: when I see how these instructions are executed and by whom, in a manner totally different from what they purport, I am strongly induced to suspect that they are merely colourable instructions, and that the real history of this transaction is connected with previous arrangements in *Batavia* between Messieurs *Fabritius* and *Wever*, and Mr. *Inglehart*, the person actually employed in putting this cargo on board.

The cargo is put on board by him, and it is a very material question, on which the fate of the cargo, and of the ship likewise may depend; Whether it was the intention of the supercargo, in this part of the transaction, to mislead the *British* courts of justice, and *British* cruizers, as to the property of the cargo? for I am of opinion, that, if such an intention can be proved in the agent, let the interests of his employers in *Denmark* be what they may, they must be affected by his conduct, and the consequence will attach on them to confiscate their property so engaged. This is no ordinary supercargo, he is the son of his employer, and appears to have been delegated with greater powers than supercargoes usually enjoy; his conduct must in point of law and conscience, and under the most lenient considerations of equity, be held to bind his principal with peculiar force. In strict law every supercargo will bind his employer; and although where law is administered with great indulgence, cases may arise in which the Court will not implicate the owner;

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owner; as in some cases where supercargoes have appeared, taking in small parcels of goods in contradiction to the orders of their employers, the Court has thought it hard to involve the interests of the owners, though perhaps strictly responsible; yet this is not a case entitled to any such favourable treatment; this is not the case of a small portion of a cargo taken in from false compassion to others, or from corrupt views of private interest; the fraud, if any, in this instance must be that of a deliberate interfering in the war, to mask and withdraw from the rights of a belligerent, the property of his enemy, to the amount of one half of a most valuable cargo. It is not the case of an ordinary supercargo; the person delegated is intrusted with the fullest powers, and if he has abused his powers so largely conferred, it is to him that the owners must look for redress.

The regular penalty of such a proceeding must be confiscation; for it is a rule of this Court, which I shall ever hold, till I am better instructed by the superior Court, that if a neutral will weave a web of fraud of this sort, this Court will not take the trouble of picking out the threads for him, in order to distinguish the sound from the unsound; if he is detected in fraud he will be involved *in toto*.—A neutral surely cannot be permitted to say, “I have endeavoured to protect the whole, but this part is *really* my property, take the rest and let me go with my own:” If he will engage in fraudulent concerns with other persons, they must all stand or fall together. Let us see then if there is not reason, not only to suspect, but to *conclude*, that there was a design to represent the cargo, which appears to have belonged in great part to

Inglehart

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Inglebart the Dutchman, as the entire property of *Fabritius* and *Wever*.—In the first place Mr. *Inglebart* was the shipper, yet his name is not once mentioned in the papers; in no one place does his name occur, which cannot be an accidental omission, since it is according to the most ordinary course of business that the name of the shipper should be specified; I must therefore consider this suppression, as a studied contrivance, to withdraw from the notice of the Court, every connection that Mr. *Inglebart* has had with this transaction. The master and the mate describe *Fabritius* and *Wever* as the entire proprietors, and Mr. *Fabritius* jun. as the shipper; they were examined as soon as the ship was brought in; and, as we may presume, before they were apprised of the existence of other papers; they agree with the formal papers in keeping out of sight the name of *Inglebart*, and never once make mention of him: This is an extraordinary circumstance, for the master is in this case not a common carrier-master; he is a confidential manager of the business, according to the instructions, yet so much is he kept in the dark, or keeps himself so, that he represents *Fabritius* and *Wever* as the entire proprietors of the cargo. It is said, as an excuse for this man, that he was affected with an almost total derangement of mind whilst he was at *Batavia*, owing to the climate, and that he came home perfectly ignorant of the transaction; but there is no mention of this malady in his deposition, nor are there any signs of it; he gives a cool and rational recital of facts, and shews at least *a method in his madness*, in every part of his conduct that presents itself to our view: he was appointed joint agent with *Fabritius*,
yet

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yet he was left under the delusion that the whole cargo, of which only half is now claimed, belonged to Messrs. *Fabritius* and *Wever*.—If he was deceived, it serves to establish the imposition on the part of others;—if he joined in the deceit, it still farther fortifies the suspicion of a general combination of fraud. Mr. *Fronier*, who was the master substituted in his place for the returned voyage, lies under the same mistake; he describes the cargo as the entire property of *Fabritius* and *Wever*. I do not say that this Court will lay down a rule so harsh as to require that every carrier-master should know the property of every part of her cargo; yet in time of war it cannot be unknown to neutrals that the master is expected to speak to the property of his cargo; more especially in a case like this, where the property is so great as one half, and where the master is a confidential person, and where there is a son of his employer in the character of a supercargo on board; total ignorance can scarcely happen to such a master; and where it is pretended, it strongly rivets on the mind of the Court a suspicion (by which I always mean a legal suspicion) that there is something behind, which it is for the interest of the parties to conceal. But the matter does not end here: there is no mention of any distinction of property in the papers: The invoice describes the whole cargo as the property of *Fabritius* and *Weaver*; and this paper is signed, not by the master but by the supercargo. It is said that the invoice is not a paper of consequence, that the bill of lading is the document to which reference is usually made; but this is both; it is a bill of lading as well as an invoice—then how came

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came this on board? It is said that Mr. *Fabritius* was ill, that the lading was conducted for him, and that he signed the paper without attention to its contents: How can I accede to such an explanation? Is it credible that a man, intrusted with the management of so large a concern, should fall into such a misapprehension as to sign a solemn paper asserting the whole property to belong to his employer, when he well knew that it did not? or can it be believed that on his recovery he should not have made himself acquainted with every thing that had been done for him? to act otherwise would be so monstrous, that no pretence of illness is sufficient to apologise for it.

But it is said Mr. *Fabritius* has, since his arrival in *England*, disclosed the truth and given in his claim for only one half, and much credit is assumed for this instance of fair and ingenuous conduct.—Allowing all the merit that is due to such a recantation, I do not know that it can be of any avail to protect this case from the penalties attaching on the former part of the transaction; for if the Court is satisfied that the intention was to hold out to *British* cruizers a *noli me tangere* as to the whole on an appearance of its being *Danish* property—although a *locus penitentiae* is to be allowed to all men, I cannot but think that it comes a little too late, under the circumstances of the present case:—Shall a deceit be allowed during the whole of such a voyage; and after it has had a great part of its effect in deceiving our cruizers, shall it be done away by this late confession? If the representation of the papers, and the master, and the substituted master, had been believed, the whole of this cargo

cargo would have been long ago safe in *Copenhagen* or *America*. But what is more material, it is to be remembered that, before the present claim was given, a disclosure of evidence had been obtained from the papers of some other cases; in the *Nancy*, which was a ship under the management of the same parties, it had come to light that Mr. *Inglehart* was concerned in the cargo of the *Eenrom*, and in the exact proportion which squares with Mr. *Fabritius*'s amended claim; this circumstance very much detracts from the merit of the confession; there being every reason to presume that no such claim would have been given if the evidence already exhibited in that case had not shewn that a claim for the whole would be completely falsified—if so, the purpose of fraud is abandoned, merely because it can no longer be maintained.

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Is the Court then to believe that Mr. *Fabritius* came into this country with an intention of making this disclosure, and of making the claim as it now stands? or that he meant to hold out the property to be as the formal papers represent? When I look to the other steps leading to this fraud, when I find all the papers on board in this tenor, and see the master and the displaced master using the same language in their depositions, even after their arrival in this country, it would be a strain of charity, much beyond what is consistent with justice, if I did not say that it was an intention, carried into effect, to cover the whole cargo, as the property of *Fabritius* and *Wever*, by persons knowing the contrary, and whose acts will legally affect their employers: What in my judgment decisively proves that such was the determined purpose

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pose of the parties is, the fact that appears, that this ship was first carried into *Lisbon*, and that an inquiry was there instituted respecting the property of this ship and cargo. It has been pressed upon the Court, by the captors, to receive the depositions there made by Mr. *Fabritius* and others; but the Court has declined to receive those depositions, as irregularly taken, and therefore cannot advert to them. How Mr. *Fabritius* swore upon that occasion, with respect to this cargo, I cannot say; but I cannot think it otherwise than highly probable, that he represented the property as entirely belonging to the house of *Fabritius* and *Wever*; because I think it impossible that after such an inquiry had been pursued at *Lisbon*, the master and the displaced master should have continued in the error (if it is a mere error) that has led them to depose here to the same effect; unless he had so held it out, as well in those depositions, as in the conversations which he must since have had with them, prior to their examinations here. And when I recollect his extreme eagerness to be examined here upon his arrival, I cannot but think that he was at that time fully prepared to support upon oath the same representation; and that nothing but the subsequent information he received, that the secrets had already been betrayed by the papers of the *Nancy*, prevented him from so doing.

With respect to the ship, Is the property in that so proved as to support a claim for restitution without farther proof? If that could be maintained, I might perhaps allow it to be distinguished from the other part of the case. But if farther proof is necessary, it comes to this question, Are persons so convicted
of

of an attempt to impose on the Court entitled to the privilege of giving farther proof? The ship was built at *Batavia*, and has been constantly trading from *Batavia*. It must have been the property of *Dutchmen*; and therefore under any circumstances a bill of sale would be necessary; and under the particular circumstances which I have pointed out, a bill of sale could hardly be deemed sufficient. But a thicker cloud is raised over this part of the case, from what appears from a paper in the *Nancy*, which is signed by *Inglehart*, and states—"I shall accompany this with the accounts of the *Eenrom*, of which Messrs. *Fabritius* and *Wever* are sharers." It is said that this applies to the cargo only; it may be so; it is a possible explanation; but how can this be proved? it can be only by farther proof. Again: There are many passages in which Mr. *Inglehart* seems to assume great authority over the conduct of the vessel. It is said that this was in consequence of a charter-party, by which he had chartered the vessel; It may be so; but this is matter of explanation only, and of farther proof; as it is left at present, on the face of it, very ambiguous. There being the necessity of farther proof, have the parties placed themselves in a situation in which they are entitled to a privilege of this kind? It is a rule that I shall uniformly adhere to, till I am better instructed, that where a party has been convicted of an attempt to impose on the Court in the same transaction, the privilege of farther proof shall be denied him, as a privilege which is justly forfeited by deception and fraud; I shall therefore pronounce both the ship and cargo subject to condemnation.

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EENROM.

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THE VRYHEID, Admiral De Winter.

Claim of joint
capture—con-
structive assist-
ance not to be
extended—claim
rejected.

THIS was a case of an *allegation of joint capture* on behalf of the *Vestal* frigate, in the capture of the Dutch fleet under the command of Admiral De Winter, October 11, 1798.—The substance of the allegation is recited in the judgment; *vide infra*.

Against the Allegation, the King's Advocate and Laurence—The legal principles on which this question must be decided, lie, it is apprehended, in a very narrow compass, although it is a question of very considerable importance; and one in which the navy are waiting, with great anxiety, for the decision of this Court: the allegation asserts only the merit of being associated in one common service, without setting forth any averment of being in fight at the time of capture. Formerly, it is well known, joint-capture was confined to cases of actual co-operation; and when, in consequence of frequent litigations, it was extended to cases of constructive assistance, for the purpose of preserving harmony and a good understanding in the navy, the being in fight became the principal criterion; and even that circumstance was in all cases not allowed to be sufficient, if there was anything to rebut the general presumption of intimidation and encouragement proceeding from it. It is on this presumption of intimidation conveyed to the enemy, and of encouragement given to the actual captor, that the principle of constructive assistance is founded; and unless it is extended much beyond what

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what has ever been done in former instances, the present case cannot, by any interpretation, be brought within the benefit of that principle. Even in cases of joint-cruizing, it has been decided, that that circumstance without the being in sight will not entitle parties to share as joint-captors.—But the present case is infinitely weaker; it is a case of a ship detached merely to convey intelligence, separating long before the engagement, or the earliest preparations for it, and not returning till the engagement was entirely over. Suppose the case of an officer landed with dispatches, and that a prize is made by the vessel in the mean time; he would not share undoubtedly; it is submitted, this case is nearly similar to that: The absence of the parties from the scene of action must alike preclude them from sharing in the capture.—No precedent can be adduced from the practice of this Court to support such a claim; and the Court will not, for many reasons, be disposed to extend the construction, but will, it is hoped, reject this allegation in the first instance, rather than suffer it to go to proof, at a great expence and waste of time, on facts, that if proved ever so clearly, cannot entitle the parties to any benefit from them.

*In support of the allegation, the Advocate of the Admiralty, and Arnold—*This is a question of very great importance to the navy, as a general question; and, therefore, if the Court entertains but a slight doubt about the admissibility of this allegation. It will, in conformity to the general practice of the Admiralty, and the Ecclesiastical Courts, admit it to proof, reserving the question of law to be considered, together with the facts of the case, at the final hear-

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ing:—Whatever may have been the history of this branch of the law, it is now the established law of this Court, that a party may become a joint-captor by mere constructive assistance; it is, no doubt, desirable to preserve the rule of construction in the greatest simplicity: but the application which is now contended for, will not in any degree break into that simplicity; being in sight, is the most obvious species of constructive assistance, but it is not necessarily the only one; and although it is founded on a presumption of encouragement and intimidation, those are circumstances which it is not necessary to prove; it is not attempted to introduce a new principle, nor to assert this position, that in the case of an associated fleet, services performed by any detached part, will entitle all to share; but that a ship detached on a particular service connected with the main enterprise, and materially contributing to its success, may be admitted to share in the interests of prize resulting from it; no uncertainty will be introduced by such a rule, the principle of decision would remain as simple as before; the Court would only have to consider whether the object of capture was, in fact, the object in view, and the cause of the detached service.—To be detached for the purpose of watching the motions of the enemy, or of procuring assistance, are essential services intimately connected with the main enterprise, and such as may justly entitle the parties to a prize interest; and in the case of the *San Joseph*, in which a whole fleet not in sight shared in the capture made by a detached vessel, it is apprehended the decision passed on the ground, that there was that *joint enterprise*, which might be held sufficient to carry with it a participation of interest; if it were otherwise,

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otherwise, to detach a vessel from the Squadron would be to inflict hardship and punishment on meritorious persons, by making them incapable of sharing in the success of the main enterprise, however much the object of their being detached might have contributed to it. It has been said, that an officer separated from a vessel, and landed with dispatches, would not share—but that arises out of the direct words of the Act of Parliament and Proclamation, which give the prize to *persons on board*, looking generally to personal services—but there is no case in which such a particular absence as this, has been held to forfeit the interest of joint capture,—it would be going too far to maintain it: suppose a party sent on shore to silence a fort, or on any other service immediately connected with the capture, it would not be said that they would not share.—Then what were the services in this case; the *Vestal* was regularly associated with Admiral *Duncan's* fleet, and had acted under Captain *Trollop's* orders in reconnoitring the *Dutch* fleet from their first appearance; she was then sent to call in aid the whole body of the fleet under the command of Admiral *Duncan*, and give information to the Admiralty; this important service performed, she again returned, and joined the fleet, and was actually assisting in securing the prisoners, and bringing the captured vessels home: This is a service of a very active nature, and comes within the principle rather of co-operation than of assistance merely constructive: It may not be improper to advert to the understanding and practice of the navy in this matter—amongst them this is almost the first instance in which such a claim has been resisted. In Lord *Howe's* memorable victory over the *French* fleet

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on the 1st of June 1794, the *Audacious* was allowed to share, though she had parted from the fleet on the 28th of May. There is also an instance in the case of the *Canada*, which had chased, and been out of sight of the fleet to which she belonged for three days, yet the whole fleet shared in her prize; and in another instance in the *Mediterranean*, in the case of the *Lowestoff*, making a capture from the fleet, the whole fleet shared: On these grounds, considering that there is no direct case against us, and that the service rendered in the present instance is fairly within the line of analogy by which this Court is used to put a construction of co-operation and joint service, on acts essentially connected with the main enterprise; it is submitted that this ship is entitled to be admitted as a joint captor.

In Reply, the King's Adv. contended—That the cases alluded to by no means broke in upon his argument; that in the case of the *San Joseph* there was a great deal of contradictory evidence, and that it was by no means established that the whole fleet was not in sight: that the *Audacious* was one of Lord Howe's fleet, and had engaged in the contest of the 28th of May, and had actually separated with a *French* vessel, the *Revolutionaire*, by that means contributing to reduce the enemy's force, and make the success of the ensuing contest of the 1st of June more certain: that the *Canada* had been detached from the fleet to which she belonged on that particular chase; and that in the case of the *Lowestoff*, the whole fleet were in sight; that these cases referred therefore to the class of cases *in sight* at the time of the engagement, or the commencement of the chase; of which there could be no doubt—but that the facts of the present case were not
of

of a nature to support any such pretensions. It was also said that the *Vestal* had herself taken a prize off the *Fewel* in which Lord Duncan shared as Admiral of the station, but that his fleet did not, affording therefore an unanswerable reason, on all terms of reciprocity, why *she* should not share in the prize made by the fleet during her absence.

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JUDGMENT.

Sir W. Scott.—This is a contest between two bodies of persons, all deserving most highly of the public, and therefore as far as individual merit can go, all equally entitled to every attention; it is a case of joint capture, and the Court has to lament that cases of this nature are in general attended with much difficulty, as they depend frequently on very minute facts, on which the Court has to decide between contradictory representations; and it is to be regretted that the decisions of the Courts on this subject have not always been so uniform as it is highly desirable they should be. It would be a very great satisfaction to me, if, with the assistance which I may hope to receive from the Gentlemen of the Bar, it should fall within my power to establish a settled and intelligible system, on principles, that may become in future easily applicable to the various cases that may arise.

The Act of Parliament and the Proclamation give the benefit of prize “to the takers,” by which term are naturally to be understood those who *actually take possession*, or those affording an actual contribution of endeavour to that event: Either of these persons are naturally included under the denomination of *Takers*; but the courts of law have gone further, and have

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extended the term "Taker," to another description of persons—to those, who, not having contributed actual service, are still supposed to have rendered a constructive assistance, either by conveying encouragement to the captor, or intimidation to the enemy.

Capture has therefore been divided into capture *de facto*, and capture by construction: I need not say, that the construction must be such as the courts of law have already recognized, and not a new, unauthorized construction; for as the word has already travelled a considerable way beyond the meaning of the Act of Parliament, the disposition of the Court will lean, not to extend it still farther, but to narrow it, and bring it nearer to the terms of the Act, than has been done in some former cases. The case of the *Mars* (a) is a strong authority on this point; in which the claim of joint capture was disallowed to ships not in company, but stationed at different outlets to catch the enemy, who were known to be under the necessity of passing through one of them; and it was in that case intimated to be the opinion of the Judges of the Common Law, (as I have had means of knowing,) that the Court ought to come nearer home, and conform more strictly to the precise words of the Act of Parliament.

In all cases, the *onus probandi* lies on those setting up the construction, because they are not persons strictly

(a) This was a case of a *French* ship taken by one of three King's ships; which, being apprized of the design of the enemy to escape from *Port au Prince*, had taken their station at different outlets to intercept them. The capture was made by one ship. A claim was given on behalf of the other two to share as joint-captors, though not present at the capture; but it was rejected.

within

within the words of the Act, but let in only by the interpretation of those acting under a competent authority to interpret it; it lies with the claimants in joint capture, therefore, either to allege some cases in which their construction has been admitted in former instances, or to shew some principle in their favor, so clearly recognized and established, as to have become almost a first principle in cases of this nature. The being in sight, generally, and with some few exceptions, has been so often held to be sufficient to entitle parties to be admitted joint captors, that where that fact is alleged, we do not call for particular cases to authorise the claim; but where that circumstance is wanting, it is incumbent on the party to make out his claim by an appeal to decided cases, or at least to principles, which are fairly to be extracted from those cases.

The facts of this case come before the Court at present on the admission of the allegation—a very convenient mode surely of taking the opinion of the Court in the first instance; for, if the facts stated, would not in the judgment of the Court be sufficient to sustain the claim, admitting them to be proved; it would only be attended with unnecessary expence and delay to the parties, to permit them to enter into proof; it would be more convenient to resort in the first instance to higher authority. The allegation is therefore very properly examinable on its first admission; it is also very desirable that all the facts should be stated at once; and that the allegation should not be sent to be amended, (as it was necessary to do in this instance; to shew the Court in what manner Mr. Trollop composed a part of Ad-

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miral *Duncan's* fleet;) for a repetition of argument on these facts, begets expence, and other consequences very incommodious to the parties, and to the Court. All the particulars are however now before the Court, and if I should be of opinion that they are not sufficient to sustain the claim, I cannot see what service I should do the parties by admitting them to proof; and therefore I should hold it better in all respects to send them to take the opinion of a superior Court in the first instance. The allegation states, "that the *Vestal* received orders from the Admiralty to join Admiral *Duncan*; that she accordingly did join him, and formed one of the fleet under his command, and received directions from him to cruize off the *Texel*, to reconnoitre and obtain intelligence of the *Dutch* fleet, which she did; that Admiral *Duncan* cruized till the latter end of *September*, and then returned to *Yarmouth*, ordering Captain *Trollop* to sail with two or three vessels to watch the motions of the enemy; and leaving directions for the *Vestal* to put herself under the command of Captain *Trollop*: that the *Vestal* accordingly did join Captain *Trollop*, and made one of the ships under his command, being part of Admiral *Duncan's* fleet, and on falling in with the *Dutch* fleet on the 8th of *October* was sent by Captain *Trollop* to reconnoitre them; that on the next day, Captain *Trollop* gave the *Vestal* a written order to sail immediately for the first port in *England*, using her utmost endeavours, to fall in with Admiral *Duncan* on the way, to send an express to the Admiralty, and then to use his best endeavours immediately to fall in with Admiral *Duncan* wherever he was, and acquaint him with the situation of the *Dutch* fleet: that in pursuance
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of these orders she sailed to *England*, landed the dispatches, and again returned, and actually joined Admiral *Duncan* on the 13th of *October*; that after the *Vestal* was so detached, Captain *Trollop*, with his Majesty's ships cruising with him, joined Admiral *Duncan*, and never lost sight of the *Dutch* fleet, from the time the *Vestal* was so detached, to the time of the capture of the ship proceeded against; that at the time of capture, the *Vestal* belonged to and composed a part of Admiral *Duncan*'s fleet, and was aiding and assisting in the capture; and afterwards, with his Majesty's ships the *Endymion* and *Ethalion*, assisted in bringing into the *Humber* two of the *Dutch* fleet captured in that engagement."

Now on these facts, and having stated the *onus probandi* to lie on the persons setting up the construction, I am to inquire on what authority this claim is to be sustained; there are no cases cited as being directly in point; but the case of the *Signior San Joseph* has been alluded to; that is a case which I perfectly recollect, having been concerned in arguing it, but it was in its principal circumstances entirely different from the present case: that was a case of two vessels detached from the fleet under the command of Admiral *Pigot* in the *West Indies*, to chase two strange ships appearing in sight, the fleet bearing up all the time as fast as possible to support them; the chasing vessels took the two ships first appearing, and also a third, on which the dispute arose. There was much contrariety of evidence, whether the fleet (which was continuing to sail in the same direction,) was not up, and in sight, and the chief doubt arose owing to the night coming on, for if it had been day, the fleet would

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would clearly have been in sight; and it was, at all events, well known to be at hand and ready to have given any support that might be wanting: under these circumstances the Court of Appeal affirmed the sentence of the Court below pronouncing for joint capture; and in that sentence it is I believe true, as it has been stated by the counsel, that some mention was made of the words *joint enterprize*—but taking the case altogether it can by no means be said to go the length of the present claim.

As far as cases go then, there is an entire failure of authority on the part of the *Vestal*; but the usage of the navy has been resorted to, and a case has been cited, of the *Audacious*, one of the fleet under the command of Lord Howe, being permitted to share in the victory of the 1st of June 1794. It is admitted, and it is certainly true, that the practice of the navy, in opposition to the words of the Act of Parliament, or a Proclamation, or to the established practice of law, cannot weigh or be of any authority: at the same time the Court would be extremely unwilling to break in on any settled and received notions of the navy, or to disturb a practice generally prevailing among themselves. But I agree with the King's Advocate, that the case cited is different from the present; in that case the *Audacious* had actually engaged the enemy's fleet, and had separated only in chase of one of their ships: The *Canada*, another case which has been mentioned, chased from the fleet by signal on the prize coming in sight: and the *Lowestoff*, which is another case, stated to have happened in the *Mediterranean*, was not detached from the *Mediterranean* fleet till after the chase had actually begun: these circumstances, therefore,
materially

materially distinguish these cases from the present; and I am at liberty to say, that no case in point, no authority has been produced. Is there then any admitted principle? The gentlemen have resorted to the general principle of *common enterprise*; and it has been contended, that where ships are associated in a common enterprise, that circumstance is sufficient to entitle them to share equally and alike in the prizes that are made;—but certainly this cannot be maintained to the full extent of these terms; many cases might be stated in which ships so associated would *not* share. Suppose a case, that ships going out on the same enterprise, and using all their endeavours to effectuate their purpose, should be separated by storm, or otherwise, no one would contend that *they* should share in each other's captures; there is no case in which such persons have been allowed to share after separation, being not in sight at the time of chasing: it cannot be laid down to that extent, and indeed it would be extremely incommodious that it should; nothing is more difficult than to say precisely where a common enterprise begins: In a more enlarged sense, the whole navy of *England* may be said to be contributing in the joint enterprise of annoying the enemy. In particular expeditions every service has its divisions and subdivisions; operations are to be begun and conducted at different places; in the attack of an island there may be different ports, and different fortresses, and different ships of the enemy lying before them; it may be necessary, to make the attack on the opposite side of the island; or to associate other neighbouring islands as objects of the same attack: The difficulty is, to say where the joint enterprise actually begins. Again,

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Is it every remote contribution, given *with intention* or *without intention*, that can be sufficient? I apprehend *that* is not to be maintained; an actual service may be done without intention; or there may be a general intention to assist, and yet no actual assistance given. Can any body say that a mere intention to assist, without actual assistance, though acted upon with the most prompt activity, would in all cases be sufficient? If persons under such claims could share, there would be no end to dispute; no captor would know what he was about, whether in every prize he made, there might not be some one fifty leagues distant, working very hard to come up, and even acting under the authority of the Admiralty to co-operate with him: in serving his country every captor would be left in uncertainty, whether some person whom he never saw, and whom the enemy never saw, might not be entitled to share with him in the rewards of his labour. The great intent of prize is to stimulate the present contest, and to encourage men to encounter present fatigue and present danger, an effect which would be infinitely weakened, if it were known that there might be those not present, and not concerned in the danger, who could entitle themselves to share.

On these considerations I must ever hold, that the principle of mere common enterprise alone will not be sufficient: it is not sufficiently specific, it must be more limited,—and a limitation is here attempted; it is said that the *Vestal* was detached on a service *immediately connected* with the object of capture; this would have been much stronger, if the primary intention on which this ship was detached

had been *absolutely* to join Admiral *Duncan*; but looking at the letter of Captain *Trollop*, I find the directions were, "you are to proceed to the first port of *England* if you do not meet Admiral *Duncan*, which you are to use your best endeavours to do on your way, &c." By fair construction then, she was not to go out of her way, she was to go to *England*, that was the mission, the other purpose was secondary and collateral, and I cannot think that this ship is to be considered, as so much connected with Admiral *Duncan*, as she would have been, if she had been sent immediately to join him. But I would ask again, Is there any authority from adjudged cases, or from principles sufficiently established, to shew that ships detached from the squadron on views immediately connected with the main enterprise are entitled to share? Many cases might be put, in which that position could not be maintained. Suppose a fleet going to besiege a place, and one ship detached to procure provisions and stores, which does not come up and join the fleet till the place is taken; it would be very strong to maintain, that such a vessel, neither present at the commencement, nor at the conclusion of the enterprise, could be entitled to share; it has, I apprehend, been decided in practice, that she would not; and the distinction taken was this, that if the ship was sent off for common necessities, after the operations had begun, or if she returned before the object was accomplished, she should be permitted to share, and not otherwise, though her absence was occasioned solely for the purpose of procuring necessities for the service. Then the limitation ingrafted on the first principle, namely, that the detachment is made for an object immediately connected

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connected with the service is not sufficient, something more must be added, and that must be the being in fight:

Then the whole turns on this question, Whether the being in fight at the beginning of the chase, in the manner in which that fact is alleged in this case, and in addition to the other circumstance, of being detached on a necessary service, will be sufficient to entitle the parties, as joint captors? I must inquire then what being in fight is necessary? for it is perfectly clear that being in fight in all cases is not sufficient. What is the real and true criterion? The being in fight, or seeing the enemy's fleet accidentally a day or two before, will not be sufficient; it must be at the commencement of the engagement, either in the act of chasing, or in preparations for chase, or afterwards during its continuance. If a ship was detached in sight of the enemy, and under preparations for chase, I should have no hesitation in saying that she ought to share: but if she was sent away after the enemy had been descried, but before any preparations for chase, or any hostile movements had taken place, I think it would be otherwise; there must be some actual contribution of endeavour as well as a general intention. Then the question comes to this, Was the *Vestal* in fight at the commencement of the chase before she separated? if so, it will clearly do; if not, I think as clearly it will not do. On this point, I am of opinion that it cannot be considered as a chase till Admiral *Duncan's* fleet came up; Captain *Trollop* dogged the enemy for the purpose of reconnoitring, but he is to be considered rather as the party chased, than as the chaser; with all the gallantry that is to be ascribed to him and the

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the other gentlemen with him, he could not be expected to cope with the whole *Dutch* fleet, and engage in such an unequal contest: When Admiral *Duncan* came up with the body of the *British* fleet, then the chase began, and that is in my estimation to be considered as the true point of commencement of actual engagement in this case. Here then is only a general intention on the part of the *Vestal*; she conveyed no terror to the enemy, nor encouragement to the friend at the time when the rival fleets must be said to have first met each other. It is said the Court will not judge by events, but I think the events of a case like this are the facts of the case; the facts of this case in my apprehension prove that the *Vestal* was not in fight at the time of the commencement of the chase, and therefore that she is not in law entitled to share in this capture.

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THE PRINCESSA, ZAVALA Master, and LA REINE ELIZABETH.

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THIS was a case arising on two *Spanish* vessels taken by his Majesty's ship the *Sea Horse*, Captain *Oakes*, September 17, 1796, before the Order of Council for General Reprisals against *Spain*, which did not issue till the month of *November* in that year. The ships and cargoes consisting of large quantities of bullion and other articles, (condemnable to the Crown as taken before *Spanish* hostilities,) had not originally been taken into the possession of the Crown, but

Demand of interest against a Commissioner of appraisement and sale, not sustained.

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but were left in the hands of the captor, Captain *Oakes*, who put them under the care of his private agent Mr. *Marsh*: Condemnation passed to the Crown on the 3d of *August* 1797, and the property was put into the hands of commissioners appointed by the Court, on the recommendation of the Crown, to superintend the appraisement and sale, Mr. *Marsh* the private agent of the captor being one: The commissions issued on the 23d of *August* 1797, and were made returnable on the first session of *Michaelmas* term following: but the first payment had not been made till the 4th of *April* 1798, and the whole payment was not concluded till the 15th of *August* in that year. The present question arose on an application of the Crown officers, that Mr. *Marsh*, in whose hands the bullion had been originally placed by Captain *Oakes*, might be directed to account for interest thereof, upon information conveyed in the report of the other commissioner.

JUDGMENT.

Sir William Scott—This is a matter which has been depending a considerable time before the Court, and, in my opinion, much longer than a business of this kind ought to have depended; for such things as the execution of commissions of appraisement and sale, ought to be proceeded on with all possible dispatch, and brought to a conclusion without delay; and the Court is particularly indisposed to suffer suits to be engrafted on disputes between its own officers, to the delay and disadvantage of the parties interested in the principal cause; at the same time it is impossible to say that occasions may not arise in which
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it may be necessary for the commissioners to stop short, in order to apply to the Court for instructions; the application when necessary, should be summary in such a case, and the directions will be given summarily; I need not add that returns to commissions must themselves be short, and simple, and unembarrassed with foreign and insignificant matter; they are merely to give the Court information of the necessary facts, upon which the Court will exercise its judgment, if any question should arise out of them: Both commissioners are necessarily before the Court, and therefore to talk of the *intervention* of a commissioner, in objection to the report of the other, or for any other purpose, is improper. An objection has been made to the return of one commissioner in this case; and I have allowed an act or statement to be drawn, and that commissioner to be heard by his counsel; but this merely for my own convenience, in considering the nature and effect of the objection taken to his return; and not as a matter of right by any means, nor as a thing to be admitted into the ordinary practice of the Court. When they have made their returns they are *functi officio*; if the Court wants explanation it will require it of them; but they have no right to press arguments upon the Court, nor to form a regular suit, which is to hang up the interests of those who are really concerned in the property.

Having premised these observations, I will say a few words; first, Upon the authority of commissioners; secondly, Upon the interests of commissioners; and thirdly, Upon their duty. I think I can see a necessity for taking some notice of these points, upon the present occasion. With regard to their authority, I

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consider them merely as the ministerial officers of this Court, deriving all their authority from this Court, and from no other source; and I have been the rather led to mention this, because, I think I observe, a notion has been picked up, that they are the agents of the persons that recommended them; and therefore in this case the agents of the Crown, immediately for its interests, *crown officers and public trustees*: The whole of this notion is unfounded according to my apprehension; they are appointed by the Court, to perform those functions of the Court in which it cannot act for itself; they represent the Court in the same manner as the commissioners for taking examinations or for any other purpose: The Court may accept the recommendation of parties, for its own convenience, in the same manner as the Bishop usually accepts the creditor who has obtained a judgment to be the actual sequestrator, though in no degree bound so to do; it is a matter in the voluntary discretion of the Court: no party can have a right in such a matter, for this simple reason, that no person can have a right to appoint a representative for another: it is the Court which delegates its functions; it is at the option of the Court, whether it will grant any commission or not, and to whom it will grant it; It may revoke commissioners though approved by the party; It may continue a commissioner in office, though against the *approbation* of the party; they are in all cases to account to the Court, and not to the persons that recommended them; there can be no doubt but that the Court will, with the most reverential deference, be disposed to appoint any person recommended.

mended by the Crown, for the care of its interests, but the Court would be guilty of no misfeasance if it granted no commission at all; and when they are appointed, they stand on the same ground as other commissioners, and are to look to this Court for their proper discharge.

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In the next place, what is the interest of commissioners? I have no doubt that the Court might, in the first instance, assign the proportion of payment at the time of appointment, and might enlarge or otherwise alter it afterwards as it should think proper, according to the circumstances of the case; by courtesy it has been usually otherwise; and to prevent disputes, and to suit the general convenience and wishes of the parties, it has been usually left to them to agree on their own terms, usually a *per centage*; but when that agreement has been made, I hold the parties are strictly bound by it, and that the commissioners are not allowed to make a fixpence advantage, beyond that *per centage*, which is settled in the agreement. To employ the proceeds for themselves, or for their friends, to sell subordinate offices, or to carve employments out of them, would be irregularities, and abuses, and breaches of that purity, with which their trust should be exercised; such advantages may be taken in fact, and I fear sometimes are, but they will not be tolerated by the Court, when they are brought to its notice; and commissioners must understand, that if they send out that money, which relatively to them is the money of the Court, either for the benefit of themselves or for the benefit of their friends, the Court will not hold them guiltless, or repute them to have rendered a due execution of their trust; and

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I desire to lay this down as a rule for the conduct of all commissioners, that the only advantage which they can legally make, is that which is allotted to them by the Court, or is settled in agreement between the parties and them.

I come now to the duties of commissioners;—they are, according to the terms of their appointment, “to reduce into writing a full, true, and perfect inventory of the ship and cargo, and to choose two good and lawful men, well experienced in such affairs, and swear them faithfully and justly to appraise the same according to their true values, and to cause the aforesaid ship and cargo to be exposed to public sale, and to sell or cause the same to be sold to the best bidder, and to bring or cause to be brought the produce money arising from such sale, into the Registry of the Court before a certain day.”

This is the simple line of their duty: it is possible, undoubtedly, that difficulties may arise in the execution of their office, but then to whom are they to resort? To the Court their constituent, whose officers they are, and whose functions they execute: this is their resort; and they mistake their way, if they go to private persons, here, or elsewhere, to be informed in what manner this Court expects its own commissions to be executed. As to any thing that concerns the interests of the Crown, in such commissions, they have the assistance and advice of the King's Advocate, the Advocate of the Admiralty, the King's Proctor, or the Proctor of the Admiralty, according to the particular course of their business. It is the duty of commissioners for the Crown to apply to them, and to act under their direction with respect to the Crown's

Crown's property; if those officers see a necessity for an application to the Court, it will be made; 'if not, the commissioners will be safe in following their instructions; if an application is necessary to be made to the Court, it should be made in due time, and whilst the difficulty is pending and capable of cure; and not be left to a late period, to rip up the whole proceedings of the commission, after every thing is finished. Thus, if one commissioner thinks the other incroaches or usurps too much authority, he should apply to the Court in an early stage, and not wait till the business is concluded, and then call on the Court to travel over the whole again in order to set that matter right; and as to interest of money, I can hardly conceive that any dispute can with propriety arise on that ground between commissioners, neither of them being entitled to make a sixpence, more than the *per centage* which is given by the agreement under which they set out; and as to the principal parties, if an application is necessary to obtain the use of the money, it should be made to the Court, whilst it is in its power to prevent the mischief. Interest is a subject on which the jurisdiction of this Court has always been very tenderly exercised; It will, on that account be more desirous to prevent the question from arising, by preventing interest from accumulating; and therefore it is extremely necessary that the matter should be brought before the Court, for the prompt payment of the money whilst it is capable of that easy and natural remedy; and that it should not be suffered to go on, with the hope of bringing up a question of interest, when it may be very difficult for the Court to enforce an order, that will be effectual

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for a remedy of that species: I say the more on this subject, because it does appear that the whole of this unpleasant business has arisen, from an inattention to that proper method of proceeding in such a case. The commission that has issued in this case was made returnable in *six weeks*, yet no return was made by either commissioner for sixteen months; and I understand that a practice has prevailed, by some accident or other, of making no payment till the whole money can be paid in; so that it may happen that 50,000*l.* ready to be paid in, at the end of *the first month*, shall be kept for *sixteen months*, till 1000*l.* more outstanding, can be brought to account. One peculiar incongruity produced by delay in this case, is, that the beneficial interest has very much shifted hands during its pendency; for the Crown, which had originally the whole interest, has retired into a corner of the case, having granted away two-thirds of the proceeds; and yet here is the Crown praying interest on the whole sum, although the party entitled to two-thirds, both principal and interest, if any interest is due, is totally quiescent.

I come now to state the facts of the case: it arises on two *Spanish* ships captured, with a quantity of bullion, before *Spanish* hostilities, by Captain Oakes, who is since dead. In the critical state of affairs between the two countries at that period, the Crown declined to take the property into its own hands, or to institute any proceedings against it. It was some time doubtful whether it would not be entirely restored; for it was the subject of long negotiations, to my knowledge, whether all the property, taken on both sides during that time of suspended hostilities,

should not be mutually restored ; it however did not take place :—Captain *Oakes* was left in possession of these valuable cargoes, either as the agent or steward of the crown, or as a person left to act according to his own discretion. He landed the bullion ;—if this had been done in the ordinary course of prize, and whilst any cause was depending on it, it would have been a great irregularity ; but I am not to apply the ordinary proceedings of the Prize Court, to a transaction which at that time was not decidedly in the nature of prize. The bullion was landed, and very properly deposited in the Bank ; it was then converted into specie by the order of Captain *Oakes* ; irregularly again, if a cause had been depending ; but still with the best intentions, and, as the event has proved, advantageously for all parties : Under these circumstances, I can by no means consider Captain *Oakes*, or his Agent as *mala fidei* possessors. Captain *Oakes* had a just title to the original possession, by a capture which has been confirmed by a sentence of condemnation ; during the intermediate time he was continued in the possession ; as I conceive the Crown usually leaves the possession of such property (although It is legally entitled,) in the hands of the captors or their agents. The conversion which took place during this time, was done upon the best motives, and to the best actual advantage ; there was nothing therefore to change the *bona fidei* possession ; and therefore I must pronounce them acquitted of any malfeasance in this proceeding.

The case divides itself into two periods ; and it is argued, first, that the Court will decree interest against the commissioner, from the time of the conversion

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into specie; but against this I think I see many decisive objections. In the first place, against whom must I decree it? If against any body it must be against the captors themselves; Mr. *Marsb* was not at that time a servant of the Court, nor a known prize agent recognized by this Court; for no war existing with *Spain*, he was not a public agent, under any prize act applying to *Spanish* hostilities; he was a mere private agent of Captain *Oakes*, and as such he might be answerable to his employers; but I have nothing to do with that; my demand must be against Captain *Oakes*, for his private agent's possession:—But I should be glad to know if any instance can be found, in which the Court has called on captors to pay interest for money, which the Crown has chosen to leave in their possession; and more particularly in a case like this, in which the Crown has granted away two-thirds of the principal sum out of its hands, and to those very captors;—and suppose the Court was ever so well disposed to decree interest upon the particular circumstances, it would be utterly impossible for the Court to travel back beyond the date of the commission: On a petition merely respecting a commission of appraisement and sale, I could not direct interest, on this part of the case, upon the present application; therefore I lay that entirely out of consideration. It is then said, secondly, That interest must be obtained for the time subsequent to the grant of the commission. The commission issued; What was then the duty of the commissioners? I must say that if one commissioner was possessed of 40,000*l.* or any considerable sum, it was his duty to have brought that circumstance to the knowledge of the Crown officers; it might be too much

much to expect him to bring it in voluntarily, whilst there was no order upon him to that effect; but if the Crown officers had been aware at the time of issuing the commission, that such a sum was in his hands, and they had intimated, as they undoubtedly would, that he should immediately pay it in, he should have given immediate compliance with that demand; that he was absolutely bound to communicate the possession of it to the other commissioner, I do not know that I am legally entitled to say; for if it had even been money which had come to his hands under the commission; still the commission, in its terms, empowers them to execute the business "jointly and severally;" and though the Court, to prevent confusion and embarrassment that might arise from separate actings, and likewise to increase the security of the property, would always require that they should proceed hand in hand; yet I do not know that a legal obligation exists, independent of any order made by the Court, for the one commissioner necessarily to divide the possession of every sum of money he has received with the other: but certainly that obligation exists less, in a case where he was in possession of that sum of money, not by virtue of the commission, but by virtue of his having been many months before the private agent of a private person, the actual captor, who had placed it in his hands, when the Crown declined meddling with it; long before the institution of any suit respecting it. However, an intimation ought to have been given to the Crown officers—it was not done; and if I had reason to conclude this was fraudulently omitted, the Court would strain hard to make the commissioner answerable if any loss had occurred.

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I will state my reasons why I do *not* hold him answerable. The commission was granted on the 23d of *August*, and made returnable on the first session of *Michaelmas* term, 1797. No return was made by the commissioner, nor was any application made to get the proceeds paid in: *there* was an error, and a most material error it has been in substance; for to my own knowledge, the whole intention and design of granting the commission in this particular form, has been in some measure counteracted by it: The business might have been transacted by commissioners immediately appointed by the Treasury; but it was thought more expedient to put it into this form of commissioners from the Court of Admiralty, in order that the process of it might be immediately and constantly within the view of the Court till the conclusion; and that conclusion might be accelerated as much as possible, without leaving the hazard of any after-reckoning, to be adjusted between the Treasury and the commissioners; and it certainly was hoped, that a very short time would have sufficed for these purposes; whereas, it has taken up sixteen months before any return whatever was made by either commissioner: This is an error, material likewise in its consequences; because if the returns had been made at the time prescribed by the commission, it would have appeared, that a very large proportion of proceeds had already been received by one of them, and of course would have been then ordered into the Registry of the Court, there to await an order for the distribution. What prevented the report of the then King's Advocate, upon the application of Captain *Oakes's* family? The ignorance of the value of the proceeds, in consequence

quence of no return having been made. What stopped the distribution? The very same cause. Whereas, if the return had been made, and the proceeds ordered in, that gallant officer would have died, with the satisfaction of knowing, that the difficulties with which his family was for some time oppressed, would be speedily relieved, by the liberality of the Crown, in the grant and distribution of a considerable part of this property. It is impossible therefore to say, that it is not extremely to be wished that the matter had been otherwise conducted in this respect—Whether it has been *so* misconducted, as to subject the party to any penalty, is another consideration: if any penalty is due, the mere payment of interest is as slight a one, as could be applied. But before I go so far as to apply it, the Court must be satisfied on two or three points: It must know that it has authority to direct interest to be paid; for unless that is shewn, all speculations on the propriety of directing it, will be superfluous and idle. Now it is a pretty strong argument against this authority, that no instance has occurred, either in this Court or in the Court of Appeals, in which the demand of interest, even against an agent, has been entertained. In Mr. *Ker's* case, the application was for the payment, not of the interest, but of the principal; and Lord *Camden* said, that if he had authority, he would order interest; that was against the agent of the party: This case, is the case of a commissioner; and if no case can be produced, in which the Court has decided on the liability of a commissioner to pay interest, it does, I think, go far to prove that the Court has *not* the power, as occasions probably have occurred for such an order.

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It must then be a strong case, that would induce the Court to make the experiment; for I will not say that the Court would, in no case, entertain and attempt to enforce the demand. I can suppose a case, of a commissioner, fraudulently, and pertinaciously, detaining money, and resisting the order of the Court to bring it in; then indeed the Court might be induced to take the opinion of another jurisdiction upon such a decree; but It would not do this, on slighter grounds than a clear case of misconduct; It would not exercise this questionable jurisdiction, where there is no such clear imputation on the person.

Then how stands the case as to misconduct? Looking abstractedly to the facts, I might think there had been some misconduct; but looking to the relaxed practice of the Court, and finding that the practice had been ordinarily the same, How does it stand then? Suppose a gentleman to come to the exercise of his commission, without any particular knowledge of the rules of practice of this Court; suppose him to come, not as a lawyer, but as a person merely used to the employment and management of money; the persons whom he might naturally have consulted, would probably have told him, that it was not at all necessary to pay in the money till the whole was liquidated, for that such was the ordinary practice of the Court: looking at the character of the gentleman concerned, and supposing him to have received such information, I think it would be too much, to expect such a person to decide for himself, that this practice was wrong; and that he would not be safe in conforming to it. However disposed I may be to censure this practice and correct it in future, it would seem too

hard to lay down, that here was special delinquency that called for penalties; it is a bad sort of reformation, which begins by an act of vindictive justice, on a person, who has been acting only as every other person has been permitted to act, under such circumstances. In this, I cannot be understood to throw the slightest reflexion on the learned Persons, who have had the management and direction of this Court before me. I am sure that that honorable Person, who immediately preceded me, would have expressed himself as I have done, if the fact had come to his knowledge. But the truth is, that such things do not ordinarily come to the knowledge of the Court. I have practised in these Courts above twenty years; and though I may appear to betray great inattention, I profess I never was aware, that commissions were not returned at the time appointed; and I might have sat here, above twenty years longer, in the same ignorance, if this particular case had not made it my duty to remark, and to correct such a practice in future (a). On the ground of particular delinquency then, I see no reason to charge this gentleman with interest; I cannot say, referring to the common current of practice, that there has been a fraudulent withholding of the principal: but it is said, that although he is not held to be *penally liable* to pay interest, yet interest is to be computed as part of the proceeds, and therefore ought to be paid. Now it is, I think, first necessary to shew that interest was made by him; it is said, that he placed it in a banking-house, of which he was a partner; and that the inference is, that it was not sleeping or lying

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(a) See the Order of Court, vol. i. p. 187.

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dead there. But suppose he had put it into any other house, would he have been liable in that case? In Chancery I presume he would; for as it is the practice of that Court, to put monies depending in it, out to interest; a person preventing that interest from accruing, might be required to pay without proof that he had personally made interest, and even if he could prove, that he had made none. But it has never been the practice of this Court, to order the money of suitors to be put out at interest, except upon their joint application and consent. The money is paid into the Registry, to wait the order of the Court, and therefore I should think it impossible to decree interest, unless interest was actually proved to have been received.

If I am right in that matter, the commissioner can be answerable only in his collateral character of a banker; but in that capacity, how could I order him to pay more than his own particular share? His partners would stand, in this case, as any other bankers to whom he or any other commissioner had confided it: And how is this Court to ascertain, what that share is, whether a moiety or a thirty-second part only? I should in such an attempt travel much out of the usual province and occupation of this Court. Adverting to all these considerations, is it proper that the Court should call on him for that share? The Court must again be first clearly convinced of its authority; for it would not proceed to exercise a dubious authority, unless on very strong grounds, and more especially, unless it appeared that the party calling for it was well entitled: The only party appearing before the Court to call for interest is the Crown officer: Has the Crown the title to this interest, if the Court could decree it? Only to one-third of it; for the two-thirds, if received, have been already granted out to the captors;

captors; who do not join in this application, but are content (as far as their conduct speaks,) that if any such advantage has been made, it shall remain with the commissioner who was their original agent or manager. What then would be the whole effect? That, if the Court could comply with the prayer, the Crown would be entitled to one-third of that interest, which must be deemed (if it can be ascertained) the particular share of this commissioner's interest,—received by him, as one of the partners of this banking-house—after the time, when the commission ought regularly to have been returned.

Upon this statement of the case, although the application has been made with great propriety by the Crown officers, I shall not attempt to exercise a new and questionable authority, in a case where the party possessing double the quantity of beneficial interest which the Crown has retained, declines to join in the application; where the result of advantage to the Crown can be but inconsiderable; and where the aid of the Court might have been called in with effect, in an earlier stage of the business, in the simple and natural process of compelling a return.

On these several grounds, I decline to sustain the demand for interest on the part of the Crown officers: With respect to any dispute between the commissioners, upon the matter of their claim to the benefit of interest, I have nothing to do with that: whether any other court would sustain a demand on the part of one of them, against the other, for a participation of interest, when neither is entitled to any interest at all, is more than I am able to say; and more than I am called upon to conjecture. This is my decision; and the use which I shall make of the whole proceeding (and
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a very important one it is) will be to prevent such a grievance from occurring again. It is high time that this abuse, of not returning commissions at the proper time, should be corrected:—I mean no imputation on any individual; every body knows how abuses insinuate themselves at first, and creep on by degrees: they begin usually in some act of accommodation and kindness, which we can hardly disapprove in the particular instance; the same facility is practised in a second instance, on little other ground than the precedent of the first: an irregularity, which was hardly censurable, ripens into settled abuse; new men come into office, and they find it become an ancient established practice, with all the sanction of grey hairs upon it; one abuse begets another, (for it is a prolific family,) till at last attention is awakened, and those who have authority, are loudly called upon by duty to correct them. They are memorable words of Lord *Bacon* upon such subjects, “That time is the greatest innovator; and if time always alters things for the worse, and wisdom and counsel do not sometimes alter them for the better, what shall be the end thereof?” In making these necessary alterations, I know I shall have the assistance of the Crown officers in this Court, as far as the property of the Crown is concerned; and in respect to private property, the Court may in general rely on the vigilance of the parties themselves, stimulating their agents to the performance of their duty, by the aid of the process, which shall at all times be readily imparted: And if such consequences follow, it may be fortunate for the public that such a case has arisen, though some unpleasant circumstances may have attended the discussion.

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A second question arose on a subsequent day on the claim of a *British* merchant, for a quantity of dollars shipped at *Buenos Ayres*, by his asserted agent, and for his account, but *ostensibly* entered in *Spanish* names, on board a *Spanish* ship, and bound to *Corunna* in *Old Spain*. The Affidavit of the Claimant set forth the following circumstances :

‘ That some time in the years 1790 or 1791, one
 ‘ of the partners of his house being at *Madrid*,
 ‘ purchased from a *Portuguese* merchant, an order
 ‘ on the Treasury of his *Spanish* Majesty at *Buenos*
 ‘ *Ayres*, for the number of 6000 hard dollars; which
 ‘ the said merchant had recovered from the Crown
 ‘ on account of an unjust seizure that had been made
 ‘ of his property: that the Appearer’s said house ap-
 ‘ pointed *Ramon Ramon Dias*, a merchant at *Buenos*
 ‘ *Ayres*, their attorney, to receive the money, who,
 ‘ as this Appearer has been informed, and believes,
 ‘ received the same from the Treasury in virtue
 ‘ of the said power of attorney and order; but instead
 ‘ of remitting the same to this Appearer’s house,
 ‘ appropriated the same to his own use: that this
 ‘ Appearer’s said house, in consequence, through
 ‘ their correspondent at *Corunna*, *Don Felipe Gon-*
 ‘ *zalez Pola*, appointed *Don Antonio de la Cajigas*,
 ‘ merchant at *Buenos Ayres*, their attorney, to
 ‘ recover the said 6000 dollars with interest from
 ‘ the said *Ramon Ramon Diaz*: that on or about the
 ‘ 14th of *July* 1796, this Appearer’s said house re-

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British merchant
 for dollars, docu-
 mented as *Spa-*
nish property, on
 board a *Spanish*
 ship from *Buenos*
Ayres to *Spain*,
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received from the said Don *Antonio de la Cajigas*, a letter dated *Buenos Ayres* the 3d of *March* preceding, informing them of his having, through their aforesaid correspondent at *Corunna*, received their power of attorney for the purpose aforesaid; that he had procured from the said *Ramon Ramon Diaz* 2000 hard dollars in part payment of the said debt, and laden 1000 dollars on board the *Rey*, and 1000 dollars on board the *Cortes*, being two packets, for their account, consigned to their said correspondent at *Corunna*: that on or about the 1st day of *August* in the said year 1796, they received a second letter from the said Don *Antonio de la Cajigas*, dated at *Buenos Ayres* the 28th *April* preceding, which was forwarded to *Corunna* by the packet *Alcudia*, confirming the former letter, and advising them that 2000 more dollars were laden on board the said packet for their account, consigned as aforesaid; and further advising them, that he could consider the whole as recovered, which he hoped would be verified by the next packet *La Princesa*: that in consequence of such advice, this Appearer's said house caused an insurance to be made at *Lloyd's* to the amount of 2000 hard dollars on board a packet or packets from *Buenos Ayres* to *Corunna*: that on or about ——— last past this Appearer's said house received a letter from the said Don *Felippe Gonzalez Pola*, dated *Corunna*, ——— *March* preceding [1797], informing them that he had received advice from the said Don *Antonio de la Cajigas*, that 2000 dollars had been laden for them on board the packet *La Princesa*, which had been taken as prize, and carried to *Portsmouth*: and this Appearer

‘ further says that 2000 hard dollars laden, and on
 ‘ board the said packet *La Princesa*, at the time when,
 ‘ in the prosecution of her said voyage from *Buenos*
 ‘ *Ayres* to *Corunna*, she was taken and seized as
 ‘ prize, did belong to him, &c. &c.’

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JUDGMENT.

Sir *William Scott*—This case stood over, for the judgment of the Court, on the claim of Mr. *Dubois*, a merchant of this town, for a quantity of dollars put on board a *Spanish* ship at *Buenos Ayres*, and to be landed at *Corunna* in *Old Spain*. The account given is, that a partner of the said house had, in the year 1791, purchased an order of the King of *Spain* on the treasury of *Buenos Ayres*, which had been received there, and detained by the agent of the claimant; but being recovered by a special application, this was a remittance of part of the sum. On looking into the papers, it appears by the manifest that the money was put on board, as the property, and for the account and risk, of a merchant in *Spain*; and the master verified the papers as true and fair, and swore “ that they contained a real representation of the property.” By the papers therefore, it appeared as *Spanish* property, and as confiscable to the King, being seized before hostilities with *Spain*; but it is argued that, notwithstanding these appearances, it would be very hard that the property of a *British* subject should be condemned upon them; the shipper at *Buenos Ayres* being ignorant of the real transaction, and of the state in which the real interest stood, knowing nothing of the real owner, and looking only to the consignee at *Corunna*; and it is said that there

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have been cases in which the Court has allowed an averment, and a claim to be set up, in opposition to the original papers: It is said also that this is not a register ship, but a mere private ship, with private papers; but I think it does appear, that if it is not a register ship, yet it is so nearly of that description, as to be exclusively appropriated to *Spanish* trade: It is a *Spanish* frigate employed as a packet of the King of *Spain*, to bring bullion and specie from *South America* to *Old Spain*; and I think the presumption is most strong, that none but *Spanish* subjects are entitled to the privilege of having money brought from that colony to *Spain*. I have looked carefully through the manifest, and I perceive there is not one shipment but in the name of *Spaniards*; therefore it appears that this is not an ordinary trade; and I must take this to be property, which must have been considered as *Spanish*, and which could not have been exported in any other character. It has been decided by the Lords in several cases, (that are so well known, that without naming them it will be sufficient to advert to the general principle,) that the property of *British* merchants, even shipped before the war, yet if in a *Spanish* character, and in a trade so exclusively peculiar to *Spanish* subjects as that no foreign name could appear in it, must take the consequences of that character, and be considered as *Spanish* property; and I think I may safely go the length of considering this ship, under the description which I have given of it, as coming under the operation of that principle.

But if it was an ordinary trade, with an ordinary bill of lading; and taking it on a more lax principle,

it would be impossible to pronounce on this affidavit and claim, that it is the property of the person for whom it is claimed: It is said that the shipper was ignorant of the person standing behind the *Spanish* consignee; but how can this be maintained consistently with what is stated in the affidavit? the transaction arose on an authority given to recover the amount of an order on the Treasury of *Buenos Ayres*, purchased in *Spain*, and the first agent delegates his authority to another; but there must have been an intercourse between the original and the substituted agent; and the shipper at *Buenos Ayres* must have been apprised that the debt was due to *British* merchants, and that the persons at *Corunna* were merely agents for them; the foundation of that solution then totally fails; he was a correspondent, and the continuance of the correspondence shews that the shipment could not have been made in this form through ignorance. Mr. *Dubois* farther states, "that he had received advice of shipments of part of the money owing to him on board other packets; and that 2000 more dollars *would be shipped in* this packet for his account." It appears from this passage that there was not a single dollar shipped on this account otherwise than in packets; and this strongly confirms me, in considering this trade as an exclusive and appropriate trade. The letters are not produced; but the affidavit state "that the correspondent informed him, *that he hoped to settle* the account by the *Princessa*;" and all that he is able to state, is, "that he had received an account that 2000 dollars *would come* on board the *Princessa*." The *Princessa* is taken—and the inference is, that he had received no intimation

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mation of the actual shipment till after the ship was known to have been captured, and then it comes not from the shipper, but from the merchant at *Corunna*, in whose name it was shipped.

Now is there any paper on board to shew that it was in satisfaction of a *British* debt? Every paper points to *Gonzalez* at *Corunna* as the owner. And what is there to shew that this person who recommended the agent to Mr. *Dubois*, might not have concerns of his own, and shipments made for him, through the hands of that agent? I think there is reason to suppose that Mr. *Gonzalez* endeavoured to shift off the interest in the money captured on Mr. *Dubois*; and I therefore think there is no more reason to convince me that the property belonged to Mr. *Dubois*, than there is authority to satisfy me on the point of law. I am under the necessity of condemning this property; but as captured before *Spanish* hostilities it will be condemned to the Crown; to whose liberality Mr. *Dubois* may still resort, if he can make out his claim; but I feel myself bound to add, that unless Mr. *Dubois* can give better proof, than he has made before me, he can have no great right, as far as I am capable of judging, to expect the recommendation of those persons whom the Crown usually consults, in support of his claim.

THE DORDRECHT, Admiral Lucas.

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THIS was the flag ship of a *Dutch* squadron, captured by Admiral *Elphinstone* in *Saldanah Bay*, *August* the 17th, 1796. The cause came on, to determine the question of joint capture between the *British* fleet, and the land forces from the *Cape of Good Hope*, asserting, to have co-operated in the capture.

A Claim of joint capture, on the part of Land Forces, asserting to have co-operated in the capture of the *Dutch* fleet in *Saldanah Bay*, rejected.

The substance of the several articles of the allegations on the part of the army having been opened,

The *King's Advocate*—It may perhaps save much time to state at first, as the opening on the part of the navy, the grounds on which it is intended to resist this claim. The navy is, we submit, alone entitled to the benefit of this capture on these grounds: It is a capture of a ship at sea, in no degree protected by any land forces; it is made by a fleet at sea, and, as such, is to be considered as a pure naval prize. The claim on the part of the army is unprecedented; no instance can be produced of a similar claim. To support the principle of joint capture between the army and navy, it is always required that some direct and actual assistance shall be shewn to have been given, not merely for the purpose of preventing destruction, but for the purpose of compelling the surrender. There is no such assistance afforded in this case by the army, nor is it proved that they contributed in any degree, even to prevent the destruction of the *Dutch* fleet; it is pleaded for the army that there was a pre-concert, but no such

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thing is established in proof; there was some communication of intelligence, but such, as being unfounded, rather retarded than facilitated the conquest. On the 12th of *August* there was a letter from Mr. *Trail* to Admiral *Elphinstone* informing him that the *Dutch* were in *Saldhanah Bay*; but that gentleman received his intelligence from a naval officer, and from that day till after the surrender, there was not only no pre-concert, but no communication between the Admiral and General *Craig*. It is material to advert to the situation of the *Dutch* fleet; the *Bellona* and the *Havic*, two frigates, were placed nearer in towards the shore, for the purpose of watering; and some shots were exchanged between these and the advanced guard of the army, but the rest of the squadron were at too great a distance to be annoyed by the army. Admiral *Lucas* says, "That if the *English* fleet had not been there, he should have placed his squadron quite out of the reach of the shore." Admiral *Lucas* received the first summons about eight o'clock in the evening of the 16th of *August*: there is no allusion to the army either in that, or in the answer of the *Dutch* Admiral: on the night of the 16th a council of war was held; and it is material to ascertain the time of the arrival of General *Craig's* letter, because it is said that it arrived before the capitulation: it appears that it reached Admiral *Lucas* about ten o'clock on the morning of the 17th; but, according to the evidence of Admiral *Lucas's* secretary, "The white flag was flying early in the morning, and a *Dutch* officer was sent to Admiral *Elphinstone* about an hour or two before General *Craig's* letter arrived." Admiral *Lucas* states, "that he was informed by Admiral

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miral *Elphinstone* that he had concerted measures with General *Craig*; but that must be a mistake, for General *Craig*'s letter to Admiral *Lucas* begins, "Although I have had no communication with Admiral *Elphinstone*, yet from signals I am induced to believe that a negociation is going on between you." Admiral *Lucas* states the wind to have blown a heavy gale from the South, the army was posted to windward, so that it would have been impossible to have run the fleet on shore in that place; and it is further stated that just where the army lay, there were sand banks which would have prevented the measure: in a case of this sort, where the chief reliance of the gentlemen on the other side, is on the intimidation which they assert to have been produced on the *Dutch* fleet by the presence of the army, it will be material to shew the impression of the captured. It appears on the ninth article, of the allegation, that Captain *Rymbende* thus addressed his crew: "My lads, we have taken care of your wives and children, and you shall be sent home: We have been obliged to capitulate because the *English* fleet is too strong for us:" nothing is here mentioned as a cause of the surrender but the superiority of force; and it is only necessary to advert to their comparative force, to shew that every other consideration was unnecessary; the *Dutch* had nine ships, three only being of the line: the *English* fourteen, of which eight were of the line. In addition to this superiority, it is said by Admiral *Lucas*, "That one inducement to surrender arose from the mutinous disposition of the *Dutch* crew, who declared they would not fight the *English* squadron." These are the grounds on which we mean to contend, that in fact

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fact the surrender was to the *British* fleet alone; that the *British* fleet was abundantly competent to enforce the surrender; that the army did not, and could not have annoyed the fleet; that the inducement arising from intimidation from the army is a mere afterthought: and that therefore taking the whole of these facts, together with the principle of law which governs joint capture, the army have not entitled themselves to be considered as joint captors in the present case.

For the army, *Arnold* and *Swabey*—In arguing this case on the part of the army, it may perhaps be convenient to state distinctly at first, some points which it is not meant to contest: In the first place, it is not contended, that the army could, of its own force, alone have taken possession of the *Dutch* squadron; it is not denied, that the *British* fleet was of itself fully sufficient to have made the capture; neither is it denied, that the actual and formal surrender was made to the Admiral, without any mention in the articles of capitulation, of the General, or of the troops under his command. But the fact on which it is intended to rely is, that the army contributed to the intimidation of the enemy, that the capture was occasioned partly by that intimidation, and therefore that the army are entitled, in virtue of that effective assistance, to be considered as joint captors. To prove the facts on which this claim is to be sustained, no better evidence can be produced than that of the captured persons; they are witnesses without bias, of interest, or partiality, or prejudice, towards either of the parties; they are usually considered as the most credible witnesses in all cases of this kind, because they are called to speak to facts

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facts which were the objects of their own senses, and to explain the impression of their own minds; they are called to say, whether the force which claims a share in the capture, was actually within their sight at the time of capture, what effect their presence produced, and how far it made a part of their inducement to surrender. These are facts to which these persons are not only the best witnesses, but they are the only witnesses which can be produced; no man can speak of the impressions of another's mind, nor of his motives; they are therefore the only witnesses that can give satisfactory information on those points: In respect to the preparatory measures which were taken, there is the evidence of some officers in the army who have released their interest, and are therefore competent to give testimony in this cause. From the evidence of these gentlemen it will appear, that it being generally understood at the *Cape of Good Hope* that a *Dutch* Squadron would soon arrive in those seas, preparations were made, by the establishment of posts and of relays of cavalry, to communicate the intelligence of their appearance as quickly as possible; by these means the intelligence was received where the Admiral and the General both were: And the Admiral set sail in quest of them; although he did not at that time fall in with them: In the mean time more particular information was received by the General, that the Enemy were in *Saldanah Bay*; it is proved that General *Craig* made every exertion to communicate this intelligence to the Admiral; and that he sent a signal, which he desired him to make on entering the Bay, and another which he promised to return in answer to it, from the heights.

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It is proved, therefore, that in this respect he took those steps which were most likely to conduce to the capture: He besides made preparations to co-operate with the fleet, and sent in the first instance a small detachment, who were not idle spectators, but communicated the intelligence to *Cape Town*, and harrassed the enemy in their operations: It appears, that this party prevented the enemy from receiving supplies of cattle, which were actually driven down to the beach for their service; and besides, that they prevented that communication between the fleet and the shore, which must have afforded information to the enemy, that an *English* fleet of superior force was expected, and must by that means have given them an opportunity of making their escape. In this respect, therefore, the precautions taken by General *Craig* were essentially contributing to the success of this capture. But a much larger force arrived soon after; and it is proved that they arrived with two field pieces, and two howitzers, about eleven o'clock in the morning of the 16th of *August*, some time before the fleet; the effect of their arrival was immediately felt by the enemy; for it is proved, that the parties which were sent on shore for the purpose of watering, were immediately obliged to return. There was also a cannonading between the advanced guard of the army and the *Bellona*, from which she received considerable damage, and it is the opinion of the *Dutch* Admiral and several other witnesses, that it was in the power of the army to have destroyed her.

These are the only offensive operations which took place during the whole time; and it appears, that they contributed very materially to the capture; for immediately

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mediately on the arrival of Admiral *Elphinstone*, he sent to summon the *Dutch* Admiral to surrender; and not receiving an explicit answer in the first instance, he made it a peremptory condition, on granting further time, that no damage should be done to their ships—this promise was given, according to Admiral *Lucas's* evidence, merely because he perceived from the situation of the *English* army, that it would be impossible to run the ships on shore, without exposing the crew to certain destruction from the army: It was under this impression only that the promise was made; for although the articles of capitulation were proposed by the *Dutch*, it is expressly sworn by Captain *Rynbende*, that they were proposed only to gain time, and not with any view of acceding to an actual surrender. The situation of the *Dutch* fleet was one of the most distressing in which brave men could be placed; they could have no great hope of success, in daring an engagement with a superior fleet; and from the position of our army, they found themselves cut off from the performance of that next duty which their country demanded of them—to diminish the benefit of the victory to the enemy, as much as possible, by destroying their ships; in this perplexed situation, they received a letter from General *Craig*, which convinced them that their apprehensions from the army were not groundless; it was a letter announcing to them “that if they attempted to run their ships on shore they would receive no quarter.” From this moment their measures were decided, and they immediately acceded to the terms which Admiral *Elphinstone* had proposed.

In this instance, therefore, General *Craig* appears to have co-operated with the fleet in the most effect-
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tual manner; no engagement took place on either part; the force on the part of the navy, was a force of intimidation only; it was a force which was only represented and displayed: the force of the army was displayed likewise, and with effect, in this denunciation; and it is acknowledged by Admiral *Lucas* and the other *Dutch* officers, that it was from their apprehension of the army, in a great measure, that the council of war, held on board the Admiral's ship, were induced to submit to a surrender: it is pretended that the expedient of running on shore was not practicable, owing to the surf which ran there, and on account of the sand banks at that point. But with respect to these, it is obvious that they were attended with danger, rather to the ships, than to the crews; and that danger was precisely the destruction, which the council of war meditated, if they had not been prevented, by the apprehension of personal danger to themselves. It is said also, that another material inducement to surrender arose, independently of any consideration of the army, from the mutinous disposition of the *Dutch* crew; but on this point there is the evidence of one of the *Dutch* captains, "that the crew were sufficiently well disposed to run the ships on shore, and that they would have done so, had it not been from the appearance of the army." In this very plea, therefore, the army were materially instrumental, in producing what is stated to have been a chief cause of the surrender.

The *Hongkarspel*
—Lords, June
30, 1786.

In regard to precedent, perhaps there is no case exactly similar to the present; the case of Commodore *Johnson* on the same spot some years ago, is perhaps that which comes nearest to it; there, although possession was taken by the fleet, yet an army operating
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by their presence on shore were considered as part of the capturing force, and allowed to share: But if no precedent can be produced, this case can be determined only on the general principle; and the great principle of joint capture, it is submitted, is simply this, that those who are present, and contributing to the surrender, although they do not concur in the act of seizure, are yet to be considered as joint captors; on these grounds it is contended that the army under General *Craig* are entitled to share in this capture.

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Sir *William Scott*—I have now heard the evidence in this case, and an elaborate argument for the army with much attention; and it may perhaps be convenient for me, in this stage to express the impression which the whole of what I have heard has made upon my mind, for the purpose of saving time; as the great pressure of business on the Court, makes it extremely desirable, that we should employ as little time as possible on unnecessary discussions. I shall still, however, be ready to hear the Counsel for the fleet, and also the reply on the other side, if the Gentlemen shall think it necessary; but at present I must say, that no observations that I have heard, nor any considerations which I have been able to give the matter, have in any degree shaken the first impression of my mind on this business.

The question is, Whether such a case has been made out, on the part of the army, as will support their claim to be considered as joint captors? In the first place, it is not pretended that it is a case which comes within the provisions of the Act of Parliament

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Prize Act,
33 Geo. III.
ch. 16.

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which directs the army to share, in some cases, in conjunction with the fleet; there are, it is well known, several descriptions of such cases, which I need not now advert to, as it is not pretended, that this case comes under any one of them. In the next place, it is not argued, that this is a case of concerted operations: That the army and navy might have similar views is not contested, but whatever was done, was done separately, and without concert or communication. Thirdly, It cannot be denied, that it lies upon the army to make out a case of joint capture, and to shew a co-operation on their part, assisting to produce the surrender; for the surrender was made to the fleet alone; Possession was taken by the fleet, the army could not take it; therefore the *onus probandi* lies on them, to prove that there was an *actual co-operation* on their part; for it is, I think, established by decided authority, and particularly in the late case of *Jaggernaickporam*, before the Lords of Appeal, that much more is necessary than a mere *being in sight*, to entitle an army to share jointly with the navy, in the capture of an enemy's fleet. The mere presence, or being in sight of different parties of naval force, is, with few exceptions, sufficient to entitle them to be joint captors; because they are always conceived to have that privity of purpose which may constitute a community of interests; but between land and sea forces, acting independently of each other, and for different purposes, there can be no such privity presumed; and therefore to establish a claim of joint capture between them, there must be a contribution of actual assistance, and the mere presence, or being in sight, will not be sufficient. Fourthly, I am strongly inclined to hold, that
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when there is no pre-concert, it must be not a slight service, nor an assistance merely rendering the capture more easy or convenient, but some very material service, that will be deemed necessary to entitle an army to the benefit of joint capture; where there is pre-concert, it is not of so much consequence that the service should be material, because then each party performs the service that is previously assigned to him, and whether that is important or not, it is not so material; the part is performed, and that is all that was expected: But where there is no such privity of design, and where one of the parties is of force equal to the work, and does not ask assistance, it is not the interposing of a slight aid, insignificant perhaps, and not necessary, that will entitle another party to share. Suppose an engagement at sea, in which a part of the enemy's crews being disposed to fly to shore should be prevented from landing by an armed force, and should therefore be induced to surrender with the main fleet; or suppose this body of armed men on shore should have prevented the fleet from obtaining supplies, two or three days previous to the action, these would be very remote services, and such as would not induce me to pronounce for a joint capture: The services which I should require, must be such as were directly or materially influencing the capture, so that the capture could not have been made without such assistance, or at least, *not certainly*, and without great hazard. It is further expected that the evidence by which such a claim is supported should be clear and consistent, because it lies on those setting up an interest of joint capture to make out their case; the presumption is on the side of the actual captor: Their evidence therefore must

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be satisfactory, for if not, or if it is left at all doubtful, it is the duty of the Court to adhere to the interests of the actual captor.

These being the principles, let us see what are the facts of the present case, and the amount of the claim grounded upon them. As to pre-concert, that has been totally abandoned on the part of the army. That the army did every thing that could be done cannot be made a question; on this point I need say no more than that it was a *British* army; as far as spirit, and courage, and patriotic, and gallant exertions of every kind could entitle them to be considered as joint captors, their claims would be readily allowed; but this is not the view of the subject which the Court is at liberty to take: The question is only, Whether in the situation in which they were, they did, or could do any thing which can entitle them, under the known rules of this Court, to be legally considered as joint captors? It seems there was a very general expectation at the *Cape of Good Hope* that a *Dutch* force would soon arrive in those seas, but as all pre-concert is given up, I do not hold it to be incumbent on me to state every measure that was taken by the naval and military commanders separately, to reach those parts where it was expected the *Dutch* fleet would first make its appearance; the only fact alleged on the part of the army before the arrival of the main body on the 16th, is, that Captain *McNabb* was stationed with a small body of not more than forty men near *Saldanah Bay*; it is impossible that such a force could do more than act as a party of observation; against the *Dutch* fleet, consisting of 2500 men, they could effect no other purpose; and I need only advert to the small-
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nels of their number to shew, that it was impossible that they could even prevent the crews from supplying themselves with water and other provisions from the shore.

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It appears in the evidence of one of the *Dutch* witnesses, "That on his arrival on the anchorage ground, he did not perceive any troops posted on the heights, and that it was not till noon of the 16th of *August*, that they were hindered in their watering parties." With respect to other supplies it is said, that, in one instance, twenty-five head of cattle being brought down to the shore by the country people, the *Dutch* butchers who had come on shore to take them off, were obliged by the appearance of some of these troops to leave their work, and go on board: This is the only instance in which they appear to have met with any interruption, and on this point what Admiral *Lucas* says is decisive; he says, "That he was not prevented by any of our posts from watering or communicating with the country."

General *Craig*'s own letter is also strong evidence to the same effect; where he says, "The *Dutch* fleet were near *Schappen Island* watering and setting their rigging, as if they meant to stay some time;" and with regard to the force of the troops in the same letter he says, "*King*, with the light infantry, is pretty close to them, but the rest of the troops cannot reach it these four days at least: I think, if you can anchor below them, it may be a bloodless, but not less glorious action:" From these representations I think it is pretty clear, that there was nothing to interrupt their quiet anchorage in the Bay, nor to cut off their communication with the country, except in one or two trifling

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trifling instances; therefore I cannot accede to what has been advanced, that material service had been performed before the 16th of *August*; prior to that day nothing was done by this party, which did, in the most remote degree, contribute to effect the capture. Indeed if they had done this service in a much more effectual manner than they had an opportunity of doing, if they had every day prevented the *Dutch* from watering, as they did in one instance drive them from their supplies of cattle, or if they had been able to prevent them from communicating with the people of the country, I should have found it very difficult to say that such services as these could entitle them to claim as joint captors. Suppose an enemy's fleet to be in the *Downs*, and that they should be prevented from landing by the garrison of *Dover* Castle; if they were afterwards compelled to surrender to our fleet, I should not hold the garrison to be in any way entitled to be admitted as joint captors. If that be so, the whole matter is reduced to the 16th of *August*, and if the services of that day will not be sufficient to sustain their claims, the preparatory services which have been relied on will, I think, not help them: Then what was done on that day? The preponderance of the evidence seems to be with the army in respect to the time of their appearance; it is, I think, proved that they were in sight of the *Dutch* squadron some few hours before our fleet arrived. But what was done? The watering parties withdrew, and nothing more; they retired unmolested, and the troops had no means of annoying them; mention is made of a cannonading which took place against a *Dutch* frigate that was stationed nearer to the shore for the purpose

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purpose of watering: But the nature of this attack seems very doubtful; some witnesses say it did considerable damage, others say very little; some say "the army could have destroyed her," others say "not without throwing shells." I own it appears to me very improbable, that it should have been in the power of the army to take or disable her, before it would have been fully in her power to sheer off; however that is not material, as it is admitted the firing ceased, leaving the frigate in the possession of the *Dutch*, and without having sustained any material injury. No offensive operations took place between the army and the *Dutch* fleet; it is said indeed in the evidence of Mr. *Ferguson*, "That as soon as the advanced corps became visible to the *Bellona*, she cannonaded them, and that one of the shot struck some stands of arms belonging to the corps, and damaged them; that the corps on gaining the heights returned the fire with four light field-pieces, and having brought up an howitzer, several shells were thrown at the vessel; that having another howitzer ready to be got up, it would have been in the power of the said corps to have entirely destroyed the frigate, and that, by marching down to the beach, they might have reached every other ship of the *Dutch* Squadron." But I cannot but look on that as a very doubtful fact, for other witnesses say, "They could not have reached them;" as, at any rate, without quitting, the Bay, they might have taken another station at such a distance as to have been in perfect safety from the army:" I cannot therefore help thinking, that it must have been a very unfounded persuasion that this witness has expressed, of the power which the land forces

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could have had of annoying the *Dutch* fleet, and I do not think it is supported by the general effect of evidence. The whole amount then of the co-operation of the army on the 16th is, that a watering party of the enemy was compelled to withdraw, and that a few shots were exchanged between the advanced corps and a *Dutch* frigate; this, with the addition of one or two other circumstances which I shall presently advert to, makes the whole amount of the services which are pretended to have been rendered by the army on the 16th of *August*. In a few hours the *English* fleet made its appearance; and what was then the situation of the *Dutch* fleet relative to the two forces separately? With respect to the army, the army could not take them, nor even annoy them. Relatively to the fleet alone, no one can doubt for a moment but that, from the first appearance of the *English* fleet, the *Dutch* squadron was an object of certain capture or certain destruction; the utmost of the argument on that side is, that the *Dutch* might have destroyed their vessels; there was no hope of escape, much less was there any chance of making effectual resistance; an engagement was hopeless in regard to the superiority of the *English* fleet, and in other respects the crews of the *Dutch* vessels shewed no disposition to fight, being, in every ship, more or less in a state of mutiny, as we learn from Admiral *Lucas* himself.

But it is said, they might have chosen the destruction of their ships, and that the presence of the army prevented them from resorting to this expedient, and therefore that they are to be considered as joint captors. It has been allowed that no such case of joint capture as the present ever occurred before; that alone is an unfavorable

unfavorable circumstance, because the Court would not be disposed to carry this doctrine farther than it has already gone, unless some clear principle could be shewn to warrant the extension. The principle of terror to support this claim must be, of terror operating not mediately and with remote effect, but directly and immediately influencing the capture. I will not say that a case might not, under possible circumstances, arise, in which troops on shore might be allowed to share in a capture made in the first instance by a fleet. I will put this case: Suppose a fleet should come into a hostile bay with a design of capturing an hostile fleet lying there, and a fleet of transports should also accidentally arrive with soldiers on board; suppose these soldiers made good their landing, and gained possession of the hostile shore, and by that means should prevent the enemy from running on shore, and from landing, and thereby influenced them to surrender; I will not say that troops in such a situation might not entitle themselves to share, although the surrender had been made actually to the fleet. But suppose the troops to land on a coast not hostile, but on their own coast, I do not apprehend that the possession of such a shore would draw the same consequences after it: For what difference would it make whether there were troops on shore or not? The enemy must know, that in a day or two the landing on a shore to them hostile, must be followed by sure and certain captivity, whether there was a party of military or not: What additional terror does an army hold out? The consequences of captivity would be the same in either case, and unless there had been a notice and denunciation of particular severity, I do

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not understand that by the laws of war they would be exposed to more than a rigorous imprisonment. Then, what is the difference between the case which I have just stated, and the present case? It is said that the country was disaffected towards the *British*, being but a recent conquest; but it appears to me that the affections of the *Dutch* were of a very mixed nature; the crews of the *Dutch* ships were mutinous from their attachment to the *English*, and swore "They would blow out the brains of any one who should fire on the *English*;" and with respect to the people of the coast, it by no means appears that they were unanimous in their disaffection; it is no proof, that because they supplied the *Dutch* fleet with provisions they were adverse to the *British*: We know that Lord *St. Vincent* has in this war been supplied with fresh provisions from the *Spanish* coasts; and it is well known in history, that when *Louis* the Fourteenth was marching against *Holland*, he was supplied with provisions by *Dutch* merchants, not from enmity or disaffection to their own country, but from the mere natural affection for gain. No stress therefore can be laid on that circumstance, and it appears certain to me, that if the *Dutch* had attempted to destroy their ships, and to effect a landing on shore, they must in a few days have been hunted down, and have become, in the ordinary course of things, prisoners of war; the appearance of a military force therefore, in my opinion made no difference; it conveyed no additional terror, or at least no such special intimidation, as could entitle them to be considered as joint captors. This is my view of the case, supposing there had been no special denunciation that a severe military execution would be

be exercised upon them if they ran their ships on shore; but it is argued, that such a denunciation did take place, with a view to bring them to a surrender; that it did produce that effect, and that without such an intimation they would have persisted to run their ships on shore. There is a great deal of evidence on this point; there is a great deal to prove that they could not have run their ships on shore where the army was stationed, but that they could have run them on shore at another place; there is however much evidence that the *English* fleet could have prevented them at that spot; and there is also much evidence that the *Dutch* crews would not have consented to such a measure.

I need not enter into a minute detail of this evidence, as I think I do not state it too strongly when I say that the fact is at least questionable, and remains at least a matter of doubt, whether this measure could have taken place or not. It is in itself highly improbable that they should wish to encounter the danger and difficulty of running on shore on an unfriendly coast, and it is not pretended that they had come to any decisive resolution on the subject; it is spoken of as being a matter of deliberation amongst them, and they are rightly described as being in a state of perplexity and distress. Some speak of it as a thing judged proper to be done in a Council of War; but all agree that it was to be discussed again, and that they had not come to any final determination on the measure. When the *English* fleet came in sight, it appears, that Admiral *Elphinstone* sent to summon them to surrender; a verbal answer was returned: Admiral *Elphinstone*

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Elphinstone sent a second summons, and demanded an answer in writing: A Council of War was held, and the result was, (for they decline stating particularly what passed at the consultation,) that they proposed terms of surrender. I think the evidence is, that they were strongly inclined at that time to come to a surrender. But it is said, that they did not expect the terms would be acceded to, but sent them only with a view of gaining time: The evidence of Admiral *Lucas's* Captain is to the following effect: he states, "That if the army had not been present on the shore, Admiral *Lucas* would not, in his opinion, have engaged the *British* fleet, owing to the mutinous behaviour of a great part of the *Dutch* crews; but notwithstanding there were enough to be depended upon to run the ships on shore and burn them, as it was the Admiral's intention to do, if he had not received a letter from General *Craig*, informing him if he attempted so rash a measure no quarter would be given by the troops to any individual that should land; that on the appearance of the *British* fleet, Admiral *Elphinstone* sent to summon them to surrender; that a verbal answer was returned by Admiral *Lucas*, that he should call a Council of War that night, and would send the result of their consultation to Admiral *Elphinstone* the next morning; that in about three hours afterwards, another letter was brought from Admiral *Elphinstone* requiring an answer in writing, and a promise that no damage should be done to the ships during the night; that such promise was accordingly sent by Admiral *Lucas*; that the consultation took place during the night, and at ten o'clock on the next morning, the 17th of *August*, proposals of capitulation were sent;" and

and then he states, "That these were sent only to gain time."

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Now they had passed their word of honour that no damage should be done during the night, and Admiral *Lucas* says "That having given his word, he considered himself bound to do no injury to the ships during the night." I cannot help thinking therefore, that if the gentlemen had ever thought of running their ships on shore, they must very soon have abandoned it, because, that they should bind themselves not to do it that night when it would be most easy, and resort to it afterwards, is not very likely. Besides, I do not see that their proposals were rejected except on one article; an alteration was proposed by Admiral *Elphinstone*, "That instead of a *Dutch* frigate other proper vessels should be appointed to carry the *Dutch* officers to *Europe*;" and this alteration was immediately acceded to on their part.

The only circumstance that could make any difference in respect to the claims of the army between the time of the proposal and the time of the capitulation is, "That General *Craig*'s letter is said to have been brought whilst they were under deliberation." It is rather difficult I think to conceive how this message could have been conveyed: it is said by a watering boat; but there seems to be no small difficulty to understand how the knowledge of this matter came afterwards to General *Craig*; however, with respect, to the arrival of the letter, there is a very material difference in the evidence, and the exact point is left very disputable; one of the witnesses says that he cannot say whether it came before or after the decision,

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Now under this evidence, and looking at all the facts together; considering the great doubt which exists, whether such a resolution was ever made, or could have been executed; recollecting that the account of the *Dutch* officers is in some measure a vindication of their own conduct, (although I do not see that any apology was necessary,) and conceiving that under their feelings as gentlemen for the misfortunes of their country, they may have expressed their sense of their obligation to destroy their vessels, perhaps rather more highly than could be justified by the fact; I cannot say that it is proved to me that the measure was resolved upon; or if resolved on, could have been executed; or if actually resorted to, that it could not have been executed without incurring any immediate danger from the army.

Under these circumstances, I am of opinion that the claim of the army is not supported on any principle, on which either this Court or the Court of Appeal has pronounced for an interest of joint capture: Even allowing the denunciation to have been made; if such principle of intimidation would be sufficient, how could I say that a crowd of the inhabitants of the coast would not be entitled also if they had threatened, as they would probably do, to knock those on the head who attempted to escape on shore after destroying the ships.

As to the former case of the *Saldanah Bay*, which has been cited, it is materially distinguishable from the present case by this circumstance, that there the fleet was close on its own shore, and the soldiers were landed from the fleet upon a hostile coast; there was pre-concert and co-operation of the most effectual kind;

kind; and therefore it is not applicable to this case. These are the impressions which this case has made on my mind. I shall be very glad to hear any additional observations from the Counsel for the Army, if they have any thing farther to offer; but I have paid great attention to the evidence and to the arguments which I have heard, and I confess the impression of mind, as I have stated it, is strong and decisive, that the claim of the army in this case cannot be sustained.

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THIS was a case of a *British* packet, re-taken from the enemy, in which a claim was given for the cargo as the property of *British* and *Portuguese* merchants, and resisted on the part of the captors on the ground of the illegality of such a trade under the stat. 13 & 14 Ch. 2. cap. 11. sect. 22.

Trading on board a *British* packet illegal: Effect of that illegality in the Prize Court to bar the claimant.

For the captors, the *King's Adv.* and *Laurence*—There is no dispute about the facts in this case, as it is allowed that the ship was a *British* packet, taken with a large quantity of merchandize on board: On our part it may be admitted, for argument, that these goods are *British* property, or belonging to *Portuguese* subjects, as suggested in the claim. That they are described as private adventures can make no difference: The quantity of these goods but ill accords with the ordinary extent of such interests; but were it

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it in point of fact true, all traffic on board these vessels is equally prohibited. The stat. 13 & 14 Ch. 2. cap. 11. sect. 22, enacts, "that no ship, vessel, or boat appointed, and employed ordinarily for the carriage of letters and packets, shall, unless it be in such cases as shall be allowed by the said person or persons which are or shall be appointed to manage his Majesty's customs, or officers aforesaid, import or export any goods or merchandize into, or out of, the parts beyond the seas, upon the penalty of the forfeiture of 100*l.* to be paid by the master of the said vessel or boat, with the loss of his place; and all goods and merchandize that shall be found on board any such ship, vessel, or boat, shall be forfeited and lost." The policy of this regulation is, at first sight, obviously, to prevent vessels engaged in this important public service from being encumbered with cargoes, which must retard their sailing, and make them a more easy prey to cruizers; and at the same time excite a greater vigilance in the enemy to intercept them: It is a trade, therefore, expressly declared illegal by act of parliament; and although it is not specified who shall be entitled to the penalty, and although it may be supposed therefore to be reserved to the King, it is not material in this case; as the way in which the act must operate on this claim is, by making the whole transaction illegal, to disable any persons from appearing in a Court of Justice to maintain a title to property taken in such an illegal traffic. The recaptors stand indisputably before the Court as *bonæ fidei* possessors of this cargo, having taken it out of the hands of the enemy; and till any persons can shew a legal title to demand it from them, they are entitled

to the full benefit of the capture; as it has been already determined before the Lords in the case of the *Eliza, Worsely*,* in which a claim of a *British* subject for property taken in a trade carried on in violation of the Charter of the *East India* Company was rejected, and the property condemned to the captor.

The *Court* suggesting, that in a question of this nature it would be proper that some appearance should be given for the Crown,

The *King's Proctor* appeared, and prayed—That the question of law, as to the interest in the penalty, might be reserved.

For the claim, the *Adv.* of the *Admiralty* and *Sewell*; for other parties *Arnold* and *Croke*—The act of parliament, which has been relied on, does not apply to the circumstances of the present case. If the whole act is considered together, it will appear that the chief object of the Legislature was to prevent frauds and abuses in the customs, as the act is particularly intitled; and with that view it was thought necessary to put certain restrictions on the trade carried on by ships of war, and in the present clause by packets. But this is done only in a special manner; not by declaring it to be an *illegal* trade, and a trade in all cases necessarily incurring the penalty of the law, but by subjecting it to the controul of the officers of the customs, and by enacting directly in opposition to the present seizure, in the 15th section, “That no seizure should be made but by the person or persons who are or shall be appointed by his Majesty to manage his Customs, or officers of his Majesty’s Customs for the time being, or such other person or persons as shall be deputed and authorized

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thereunto by warrant from the Lord Treasurer or under Treasurer, or by special commission from his Majesty under the great or privy seal, and if any seizure shall hereafter be made by any other person or persons whatsoever, for any the causes aforesaid, such seizure shall be void and of none effect; any statute, law, act, or provision to the contrary in anywise notwithstanding." Suppose a seizure had been made then in this case by any person not competent to seize, and the matter had been brought forward in the way of an information; would it not have been a sufficient plea to have shewn that the seizor had not a *persona standi in judicio*? It must evidently be so—for no proceedings can be instituted, but under the act; and therefore it is, in the first instance, necessary to be shewn that the proceedings are according to the directions of the act. The case of a seizure by prize is very different from the seizure directed by the act; and when it is recollected how strong and general the terms are, "that a seizure by *any other persons* whatever shall be void and of none effect, any statute, act, or provision to the contrary notwithstanding;" it cannot be doubted that this seizure is one of those expressly discouraged by the act: The object of the act was to harass trade as little as possible, in the way of general informations, but to submit the expediency or in expediency of allowing this particular mode of trade, to the officers of the Customs. In the present case it may reasonably be contended that the trade has passed under their inspection, and received their permission and tacit assent at least, although no express licence can be produced. The goods in question were all taken from the quay,
and

and all entered at the Custom-house for exportation, and the very notoriety of the shipment of such a cargo at a place like *Falmouth*, where it could not be overlooked, is sufficient to entitle the claimants to say, that as far as the consent of the officers of the Custom-house can protect them, they are protected.

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The Court asked, Whether the goods were entered for exportation *on board a packet*? no answer being returned—the Court asked, Whether it was contended that the subordinate Custom-house officers were empowered to give this consent, supposing that the circumstances of notoriety were sufficient to raise a presumption of knowledge of the fact in them?

It was said that “the persons aforesaid,” mentioned in the 22d clause, as being empowered to grant the allowance, were in fair construction the same persons as those mentioned in the 15th clause, to whom the right of seizure was confined.

In reply, the King's Advocate contended—That no tacit assent or connivance could be pleaded to dispense with the regulations of an Act of Parliament; that whatever might be the circumstances of notoriety under the view of officers on the quay at *Falmouth*, they were not the persons in whom the power of giving allowance was lodged; that “the person or persons aforesaid,” in the 21st clause, referred to those named in the very next preceding clause, in which the case of goods landed by permission was provided for, and the words of which were, “That all foreign goods and merchandize, which, by the person or persons which are or shall be appointed by his Majesty for the managing the Customs, and the Customer, Collector, and Comptroller, shall be permitted, &c. &c.”

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evidently reserving so important a discretion in the hands of those superior officers;—and that the permission alluded to in the 22d Clause, could only refer to the direct allowance under the authority of these officers.

JUDGMENT.

Sir *Wm. Scott*.—This is a case, as it has been truly observed, of a very different complexion from those which generally occupy the attention of this Court; it turns upon a principle which the Court of Appeals has sanctioned, in respect to the power of a Court of this nature, to take cognizance indirectly of breaches of the municipal law of this country. This Court is properly and directly a Court of the law of nations, and I am not aware that any case had occurred before the present war, in which the Court had acted on the principle on which it certainly did act in the case alluded to, I mean the case of the *Eliza*. It was the case of a ship and cargo, in which the claimant being a *British* subject appeared to have been engaged in trafficking with that cargo in direct violation of *British* Acts of Parliament. It occurred to those who were entrusted with the concerns of the captor, that a resistance to such a claim might be sustained, upon a ground which had not been occupied in any other case that had occurred, *viz.*—That although this Court is properly and directly a Court of the law of nations only, and not intended to carry into effect the municipal laws of this or any other country; and although it was in the habit of declining to take notice of the private laws of other countries; yet it was an inquiry worth pursuing, Whether a *British* Court of Admiralty, sitting

ting here, armed with its power from this country, and carrying all its process into effect by the authority of the *British* Parliament, was not so far a *British* Court as to be bound to take notice of *British* Acts of Parliament, and the flagrant breach of our municipal laws, with respect to the transactions of our own subjects coming incidentally before it. In that case, the Court of Admiralty did not sustain the objection to the extent in which I have now stated it: My predecessor condemned the cargo, but generally as *French* property. The cause went up to the superior Court, where it was most elaborately argued; perhaps no case ever underwent a fuller discussion; there, the principle was affirmed and established, that a *British* Court of Admiralty was bound to take notice of a violation of an Act of Parliament, appearing on the face of the claim, and that a *British* claimant could not entitle himself in such a Court, to a restitution of that property, happening to fall by accident into the hands of a *British* captor, which, by his own shewing, appeared to have been employed in an illegal trade.

That this decision has removed all difficulties on this question I will not assert; it is a good moral and legal principle unquestionably, that a man must come into a court of justice with clean hands, and that the law will not lend its aid to persons setting up a violation of law, on the face of his claim. It is a sound maxim, to which the courts of the law of the land have always attended; and whether the penalty is great or small, or whether there be no penalty at all, yet, if the act is reprobated, a man will not be allowed to claim a right founded on it: But cases had not occurred

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in which the Court of Admiralty had met with occasion to apply such a principle, except in cases of *British* property taken in a trade with the King's enemies; but in such cases the exception is not to be considered as arising, from municipal law, but from the principle of allegiance, which is a general principle of the law of nations. It was in the case of the *Eliza*, that it was first decided, that the Court of Admiralty was bound to take notice of an illegal practice, evidently appearing in the conduct of a *British* subject; though the illegality arose from a violation of some law merely municipal; and that it was bound to reject the claim of any *British* subject, whose property had found its way into the hands of a *British* captor, if the transaction in which that property had been employed, was a transaction contrary to *British* law. The question is still not relieved from all its difficulties, and the observations which have been made to-day, only revive the objections which were made before; it was said, (and cannot be denied,) that such a practice might carry the interest in a very different course, from what the Act of Parliament which had been violated, directs. In the *Eliza*, which was a case of traffic illegally carried on in violation of the charter of the *East India* Company, the interest has gone to the private captor, whilst the penalty by the Act of Parliament is given to the Company as a compensation for the damages arising to them from such illegal trade. In the *Enterprize*, the course has been the same: But in the *Etrusco*, a later case, it has been questioned, whether those decisions were right as to the conveyance of the forfeiture, and whether the penalty should not go to the King, as the person injured

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jured by every violation of the law, where no specific appropriation of the property was directed; and this question still remains subject to further deliberation; on that part of the case, therefore, I shall not think of deciding till that question is disposed of.

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As to the facts of this case they are pretty clear; the vessel is a *British* packet, and by the stat. 13 & 14 Ch. 2. c. 11. f. 22. the carrying of all merchandize on board a packet is prohibited, except under special allowance there described; the amount of the articles is immaterial, except in a very minute degree, which the revenue laws themselves have specified; the quality also is altogether immaterial; neither does it make any difference whether the owners are on board or not, or whether the lading is called a cargo or a private adventure; the prohibition is general, against the carrying *any merchandize*: With the policy of the act I have nothing to do, as the law has determined it; but the reasons pointed out by the King's Advocate are obvious, that a cargo must be a hinderance and obstruction to dispatch and expedition; and if it is said, the crew would defend themselves, and fight the better for a cargo; it is to be remembered at the same time, that it holds out a greater lure to the enemy. These goods are admitted to have been put on board for *Lisbon* for the purposes of trade, and the only question is, Whether they come under the allowance of the Act of Parliament? The exception is, "Unless it be in such cases as shall be allowed by the said person or persons which are or shall be appointed to manage his Majesty's Customs or officers aforesaid." Then who are the persons invested with this discretion? I think, by fair construction of the

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act, they must be those mentioned in the clause immediately preceding, in the 21st section, the Collector and the Comptroller of the Customs; on any other explanation, every tide-waiter would be competent to grant this indulgence, which is an interpretation the Court would not willingly admit, unless absolutely forced upon it. In the next place, What sort of allowance would be held sufficient? It has been argued that a tacit permission would be sufficient, that it would be enough if a practice had grown up by connivance; but I cannot accede to that argument, nor can I consider that to be the permission which the statute recognizes; it must be a full, distinct allowance, and expressed in such a manner as to be capable of proof: If it were proved to have been practised in twenty instances, it would avail nothing; it would only shew that the due vigilance had been laid asleep; but it could amount to nothing as a legal dispensation, nor be considered as any legal allowance which the Court can receive. Then how stand the facts? The claimants appear before the Court as persons trading contrary to law; it is said, there can be no seizure but by the Custom-house officer—I admit it; but this is not a case of seizure. It is said that no forfeiture can attach but in a particular manner directed by the statute; and it is true; but this is not a forfeiture—although to the parties it has certainly much the same effect. The question is, What will be the effect in a Court of Prize? Whether a party can be admitted in this Court to say, “True it is, I have been engaged in an illegal trade, but the property is mine, give it me, and let me go?” It has been decided by the superior Court, that he shall not. In the Exchequer, the
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seizing officer is put to make out *his* case ; but here it is different, the claimant must support his title, and if the Court of Appeal has determined that such a person is stopped *in limine*, it matters not to him what becomes of the property; he can have no right to moot difficulties in this Court, as to the final disposition of it : looking on the decisions of the Lords on this point, as undisturbed decisions, I must apply the principle to this case, which, I am of opinion, comes fairly within it; but as I am aware of the doubts which have arisen on the judgment of the Lords of Appeal in the case of the *Etrusco*, and as I know that Court feels it to be a question of weight, I shall direct this case to stand over as to that point, to await their final decision. A mistake has run through the whole of this argument; the gentlemen have argued to bind me down to this particular act, and then the difficulties arising from it are pointed out; but that is not the state of the case. The question is, Whether I am to apply the general principle? The Act of Parliament is used only as a medium of proof, to shew that what has been done is illegal, and then the principle applies, as a great moral, and legal principle, adopted in a very great extent in the jurisprudence of this country, and particularly sanctioned and introduced into the practice of this Court, by those decisions to which I have alluded.

Claim rejected—Question reserved, to whom the Property is to be condemned?

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THE KINDERS KINDER, HAYSEN Master.

Claim admitted on behalf of the *Danish* government for *Algerine* property taken under the *Danish* flag, the Dey having exacted payment from the *Danish* consul.

THIS was a case of a claim given on the part of the *Danish* College of Commerce, praying to be admitted in the place of *Algerine* subjects, whose property had been captured on board a *Danish* ship, and for which the Dey of *Algiers* had exacted immediate compensation from the *Danish* Consul.

JUDGMENT.

Sir *Wm. Scott*.—This is a very singular case, in which the Court has certainly considerable difficulties to encounter, and one in which it may perhaps be impossible to decide in any way that may not be liable to some fair objection. However, the Court must find its way as well as it can, and can hardly undertake to do more than to give what the law terms a *rusticum judicium*, or a coarse sort of equitable arbitration. It is certainly the duty of captors, in all cases, to carry their prizes to places where they can be put into a course of legal enquiry; but in captures made on the property of *Oriental* subjects, a more than ordinary caution, and regularity of proceeding should be observed, because it is very much the practice of those countries, under a law of nations now peculiar to themselves, to resort immediately to a very summary justice, and to redress themselves for what they consider as an unjust capture, by demanding compensation from the countrymen of the aggressors. *British* subjects resident amongst them may be exposed to very alarming difficulties and danger for

acts of other persons, if those acts are not guarded with the most scrupulous care.

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At the time when this capture was made, the King's naval officers in the *Mediterranean* station were acting in a very critical situation of affairs; the exigencies of the moment are the best excuse for what was done, or neglected to be done, irregularly in these proceedings. The cargo consisted of corn, sugar, and cotton, laden at *Algiers* on board a *Danish* ship, and destined ostensibly to *Leghorn*, but, according to a second charter-party, and, as I think, *really* to *Marseilles*; immediately on hearing of the capture, the Dey of *Algiers* sent for the *Danish* Consul, and with an emphasis which the *Danish* Consul did not perhaps think it prudent to resist, demanded of him to refund the value of the cargo taken on board the *Danish* ship; alleging that the *Danish* flag ought to have protected the cargo, and that if it did not, the *Danish* Government and its public agents were answerable; the *Danish* agent paid the money under this demand, and on a representation of all the circumstances to the *Danish* government, they reimbursed him, and the application now made is, that the *Danish* government may be permitted to claim in the place of the original proprietors.

All civilized governments have a common interest in paying great attention to each other in their proceedings with the *Barbary* states; and the Court would certainly be very glad to have it in its power, to aid substantial justice in the dealings of all *European* subjects with them. At the same time it must be understood, that if subjects of a neutral country submit to any flagrant act of violence, as for instance, if the
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Dey of *Algiers* should step forward to claim a cargo, evidently *French*, and they submit to refund the value of the property, I should, certainly not permit their acquiescence to defeat the right which a *British* captor had gained in such a cargo. But in a doubtful case, the Court would incline to support an act done for the prevention of mischief, and although the transaction might not be strictly correct, if it appeared to have a solid foundation of justice at the bottom, the Court would be strongly inclined to uphold it in its full extent.

With respect to the evidence in this case, the papers have been twice translated—first from *Arabic* into *Italian*, and then from *Italian* into *English*; what sort of a transit they have had into *Italian* I cannot say, being not acquainted with their original language the *Arabic*; but to be sure the Court could not have had a worse medium of information than these *English* translations. From the many inaccuracies which are obvious, I am convinced that, were they to be closely examined, they would be found to contain no representation at all of the *Italian* letters.

On reading the different letters however, I am strongly impressed with an opinion, that the Dey, in speaking of the property as *his own*, spoke as Sovereigns are apt to speak, connecting the interests of their subjects with *their own*; the letters strongly point to an interest in this cargo as being *not* in the Dey, but in some *Algerine merchants*, his subjects; and I understand him therefore as interposing rather to protect the interest of *his subjects*, than to assert any private interests of *his own*. But if it is so, it would be too much to say that, because the real proprietors applied

applied to their own government in the first instance instead of applying here, they should therefore forfeit that redress, which they might have had by pursuing it here originally in the regular mode: the *Americans* we know did the same; they applied to their government, and desired their claims to be put in adjustment between the two countries. The Dey has his *mode of adjustment*, but it would be hard that therefore his subjects should forfeit the redress, which they might have received here in the first instance if they had proceeded in the regular manner. They have had compensation, it is true, by means of the Dey's requisition made upon the *Danes*; but if this has been done to prevent innocent subjects of *Denmark* from suffering, I think that the Court is bound to give the *Danes* the benefit of all the equity that could have belonged to the *Algerine* claims, if they had been brought forward: the captors suffer nothing by this measure, for they could have no right to detain what belonged to *Algerines*, and if the *Algerines* have received payment from the *Danes*, still that can convey no interest to the *British* captors. Under these considerations I shall not call for particular claims to be given for the private proprietors of the property, claimed generally as the Dey's own, but I will endeavour to assign, as well as I can, *crassiore telâ*, in a coarse kind of way, what appears upon the evidence to be the respective interests of the different individuals, and shall restore or condemn as those individuals would have been entitled, if they had stood before the Court.

Mr. *Busnac*, I think appears to be interested to a considerable amount—in one third of the cotton
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clearly, that I shall restore to him as an inhabitant of *Algiers*: he seems also to have been a proprietor of one-third of the 2069 *measures of corn*, and also a part owner of that laden at *Teideles*; for I think from the manifest that quantity must have been on board this vessel; I restore therefore a third of these parcels.

There is next a parcel mentioned in the letter as being *for our account*; the question is, Who are the individuals composing this firm? *J. Bacri* the broker, resident at *Algiers*, must clearly be one, and I think his brother resident at *Leghorn* must be another; I shall restore their shares.

Another share, must, I think belong to a person, another brother, resident at *Marseilles*; the letters, in the whole tenor and style of them, point to such an interest. His share I shall condemn, the rest I restore, and direct it to be paid to the *Danish* government. I am sorry that the *Danish* government should suffer *any loss* in this affair, but I have the satisfaction of thinking that it is not owing to the injustice of this country; it is an inconvenience to which all *European* states are liable in transactions of this nature where the *Barbary* states happen to become parties.

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THE FORTUNE, SMITH Master (a).

Claim on behalf of the *American* government for *Algerine* property not admitted, owing to the manner in which the *American* flag had been assumed.

THIS was a case of a claim given on the part of the *American* government, praying to be received to stand in the place of *African* merchants; in respect

(a) This case is here reported without regard to the date, on account of its connection with the preceding case.

to

to a ship and cargo, taken 5th January 1797, on a voyage from *Bona* to *Marseilles*, sailing under *American* colours, and for which the Dey of *Algiers* had forcibly exacted compensation from the *American* Consul.

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JUDGMENT.

Sir *Wm. Scott*.—This is a case of a ship and cargo claimed on behalf of the government of the United States, and of Messrs. *Busnab* and *Bacri*, *Algerine* Merchants, subjects of the Dey of *Algiers*. The affidavit of claim represents, "That in the month of July 1796, *Joel Barlow* Esq. the *American* Consul at *Algiers*, having procured the liberation of the *American* prisoners then in confinement at *Algiers*, (the state of the plague at that time rendering it dangerous for them to remain longer in that place,) he was desirous of conveying them to *Marseilles*, but that there was no vessel on which they could embark, except the ship *Fortune*, which then belonged, as this deponent is informed and believes, to Messrs. *Michael Busnab* and *Joseph Coen Bacri*, *Algerine* merchants and subjects; and that the *Algerines* being at war with *Genoa* and *Tuscany*, it was thought inconvenient for the *American* passengers that the vessel should sail under the *Algerine* flag; that the aforesaid *American* Consul therefore, to prevent an interruption by capture of his humane purpose, took, a bill of sale for the ship in his own name, and gave her the *American* flag, and appointed — *Calder* to the command, directing him to destroy the said bill of sale when he had reached his port of destination; and this deponent saith, that he is informed and believes that the said ship arrived safe with the aforementioned *Americans*

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at *Marseilles*, still continuing to be the sole and entire property of the said Messrs. *Busnab* and *Bacri*, and that *Michael Smith* an *American* citizen, there took upon himself the command of the said ship under the directions of the said owners, and set sail with her, namely, on or about the 17th *November* 1796, in ballast, bound to *Bona* on the coast of *Barbary*, where the ship arrived in or about the month of *January* 1797, and was immediately laden with a cargo of wheat, to be delivered at *Marseilles*, though specified in the bills of lading as destined for *Genoa*; that the said cargo was shipped by *Michael Busnab* aforesaid, for account and risk of the said shipper, and of his partner the aforesaid *Joseph Coen Bacri*, *Algerine* merchants and subjects as aforesaid; and this deponent further saith that he hath been informed and believes that the said ship was proceeding on her said voyage, when, on the 5th of *February* following, she was captured and seized as prize; that the Dey of *Algiers*, upon receiving information of such capture, caused a demand of indemnification to be made upon the aforementioned *Joel Barlow* the *American* Consul at *Algiers*, upon the ground that the cargo had been put on board a vessel sailing under the *American* flag, and which the *American* government, and not the Dey, was bound to support; and that to prevent any dispute or misunderstanding with the said Dey, the said *American* Consul thereupon drew bills upon the *American* Agent for 40,387 $\frac{2}{3}$ dollars, the sum demanded as the value of the ship and cargo to be paid within six months in *Algiers*, and if not then paid, giving the Dey a right to draw at three months sight on the *American* government, payable in *Philadelphia*; and he also saith, that from the circumstances herein-
before

before stated, he is advised and believes that the *American* government or the said Messrs. *Busnab* and *Bacri*, the said owners of the said ship and cargo, will be the only losers by a sentence of condemnation of the said ship and cargo."

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The *American* government therefore comes in not as proprietors, but as persons *finally* concerned in the property, on whom the loss will fall if condemnation takes place. The case has been compared in all its circumstances to the *Kinders Kinder*, in which a claim was admitted on the part of the *Danish* government, and in which the Court did find its way in a coarse sort of manner, to what It considered to be the substantial justice of the case; to restore those parts which appeared to be the property of *Algerine* subjects, and to condemn those parts in which there appeared to have been *French* interests; but, I cannot but think, that the two governments here stand on very different grounds: In that case the ship was an undoubted *Danish* vessel, there was no question on that point; but the Dey had set up his principle of the law of nations, "that the national flag was to give security to all the property on board," and he had acted on that notion, so far as to exact from the *Danish* Consul a compensation for all the property, on board the vessel, which was claimed by his subjects; the *Danish* government not choosing to contest the right, and finding it to be for their convenience, as any other *European* government would, paid the money; and if this was a case resembling that, or if the reason for wearing the *American* flag in this case, could be satisfactorily made out, as it is stated, this Court would hold itself bound to go the same length, and give the same

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same aid, that it gave the *Danish* government in the former instance; but it is admitted here, that it was not an *American* vessel, but a vessel that had assumed the *American* flag, in the first instance, for the laudable purpose of giving more effectual security to the transporting some *American* subjects from slavery, and if she had been taken in that employment, I should have held her well entitled to all the protection that could be given to her. But the present is no such voyage; as soon as that office was discharged, the *American* character ought to have been discarded—to continue the national flag afterwards, for views of private interest, was, I think, in a considerable degree reprehensible.—Were those who represent the *American* government privy to this? I cannot but think that the paper No. 2, which is a letter written by Mr. *Barlow* to Captain *Smith*, does strongly indicate an intention of navigating this ship as an *American* vessel, though having no connection with *America*. “The Jews who own the ship wish you to take the command of the vessel after the *Americans* leave her, I wish you to keep this a secret for the present;” Was he to take her as an *Algerine* vessel? The fact has proved that she was to be navigated as an *American*; there is a bill of sale from *J. Bacri*, describing himself to act by order of Mr. *Barlow*. “*J. Bacri*, (acting by order, and for account of Mr. *J. Barlow*,) has sold and ceded to Captain *Smith*, the interest in this vessel, for Mr. *Donaldson*.” Is the Court to suppose, that the name of *Barlow* was used on this occasion without his knowledge? That, I think, is highly improbable; there occurs besides, the name of another agent of the *American* government in this matter,

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matter, that of Mr. *Cathaban* the *American* Consul at *Marseilles*; the bill of sale is signed by him, and certified and attested by him jointly with the master, they both describing the ship as an *American* vessel. Can the Court suppose that he was ignorant of the real property, and of the transaction in *Barbary*? Here is a vessel coming on a public service to *Mar-seilles*, in a singular character, with *American* prisoners, and dressed up in *American* colours by the Consul at *Algiers*; am I to suppose that all this could have been done unknown to the *American* Consul at *Marseilles*? I cannot but think that Mr. *Cathaban* must have known that the vessel was not the property of *Donaldson*, but of *Busnah* and *Bacri*, and that whatever might be the motive of the misrepresentation, the two agents entrusted with the powers of the *American* government in those parts could be no strangers to the fact. Now whether it was done fraudulently against this country, with a view of perplexing the enquiry of our cruizers, or of this Court, I think it is not very material; if it was done against the *Swedes* or *Danes*, it was still a voluntary interposition of these public characters, to disguise this ship and make her appear what she was not, and supposing it to be done without any fraudulent design, there is still that which ought not to appear, more especially from public persons, an attempt to misrepresent the national character of the vessel; the inconvenience of such a conduct will appear from what followed; the consequence has been, that on the capture of this vessel the Dey falls back on the *American* government, and demands an indemnification for the property of his subjects taken under the protection of an *American* flag. How came she to be sailing

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under that flag? Did it belong to her? Certainly not, it was assumed under the direction of the *American* Consuls, and I cannot but think that the *American* government would not, in strict justice, be bound to indemnify their agents acting in this business, not only in a manner which their instructions did not authorize, but also in a manner which, if strictly considered, was inconsistent with the duties of the public functions which they were intrusted to exercise: if they are disposed to indemnify them it is an act of liberality to which no person can object, they may be useful servants of the *American* government, they may have merits in other parts of their public conduct very proper to be remembered by their government, and to entitle them to its protection, even where they had committed a mistake or an indiscretion, but considerations of liberality of that kind will not found a demand against third parties. In this respect then, I think, the *Danish* and the *American* governments stand on very different grounds; in the *Danish* case there was no question of the property of the ship, no *Danish* agent had interposed irregularly, but in this case we have two *American* Consuls interposing in this irregular manner to give a colourable appearance and character to this vessel; this is not an *American* ship at all, it is a ship of another country, and has no pretension to an *American* character. The result will be, that I am to consider this case as if the *American* government had not appeared in it, and to look to what the proofs are, as between the *British* captor and the *Algerine*, without any mixture of tenderness for *American* interests, which I should certainly have felt it my duty equally to respect, if, in truth, such interests had been involved in this case,

on

on the same footing on which *Danish* interests had been introduced into the other.

Considering this case as merely between the *British* captors and *Algerine* claimants, I do not, at the same time, mean to apply to such claimants the exact rigour of the law of nations as understood and practised amongst the civilized states of *Europe*; it would be to try them by a law not familiar to any law or practice of theirs, and therefore, though the ship appears to have been a prize taken from the *British* by the *Spaniards*, yet having been transferred to these subjects of *Barbary*, I should not be anxious to enquire whether she had ever been regularly carried into a *Spanish* port, though the fact, I think, does sufficiently appear that she had been in such a port; neither should I press to the uttermost extent in this case that other principle, (though in itself most rational,) that where a person has been detected in a fraud in the particular transaction, he shall not be admitted to the benefit of a further proof; for we must pay some attention to the rules of morality and law that prevail amongst such people.

As to the evidence of the property of the ship, it is not clearly proved to whom it belongs, but collecting it as well as I am able, I should say, that the strongest presumption is, that it belongs to *Jacob Bacri* of *Marseilles*; for although the papers are full of contradictions as to the national character, as to the destination, and also as to the property, yet I think the greater number do point to him as the proprietor of this vessel: as to the cargo it is not so strong; perhaps the preponderance of agency and management relative to it lies on the side of persons in *Algiers*; but still there is great doubt to whom the property belongs, the papers being full of contradic-

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tions also on that point. The question is then, Shall the Court, being willing to relax its rules in some degree, so far relax them as to admit farther proof? No one can doubt that if it was an *European* case it could not be allowed; looking at the series of falsehoods, at the false property, false destination, and false description of the national character, the Court would say, "You shall not be let in to give farther proof." But supposing that I was inclined to relax the rule, Have I any prospect of obtaining satisfaction from farther proof? Can any person concerned for the claimant say, that I have any chance of obtaining from *Algiers* a true distinction of the actual interests? I see little prospect of it; the *Algerines* have already got their money, and I have no reason to suppose that they would trouble themselves about the matter; but if they did, Can I be so sanguine as to hope that there would be a fair disclosure? In the other *Danish* case the property could, in some degree, be distinguished by the papers before the Court: in this case it is admitted that it cannot. This being the state of things, I am at a loss to see what satisfaction could be derived if I was disposed to allow such an extraordinary indulgence. Being of this opinion, and not thinking that there is any privilege due on account of the *American* flag so irregularly employed, I find myself under the necessity of determining on the present evidence. That is allowed to be not so sufficient as that I can restore upon it; the consequence is, that I must pronounce this ship and cargo subject to condemnation.

The circumstances that gave rise to the two preceding cases, remind us of what *Bynkershoek* says of the *African* states, "*Sed his magistris in jure publico, nemo facile utetur.*" *Q. J. P. l. i. c. 15.*

THE REBECCA, MOORE Master.

July 12th,
1799.Freight refused
between the co-
lonies and mo-
ther country of
the enemy.

THIS was a case of an *American* ship taken on a voyage from *Surinam* to *Amsterdam*, (22d *April* 1796,) with a cargo of colonial produce; the ship had been restored by consent, reserving the question of freight and expences; some parts of the cargo had been condemned as unclaimed, 19th *June* 1798; farther proof was directed to be made of other parts claimed or *American* citizens.—On motion for an allowance of freight to the neutral ship—

Court—Certainly not; I shall in no case of this sort, of direct trade between the colony and the mother country, give freight, until I am instructed so to do by the Superior Court.

In the *Emanuel Soderstrom*, vide *supra*, vol. i. p. 296. the Court refused to give freight to neutral vessels carrying a cargo between different ports of the enemy's country. In the *Wilhelmina, Carlson*, 23d *July* 1799, which was a *Danish* ship taken on a voyage from *Havre* to *Amsterdam*—on motion for freight,

The *Court*.—In the case of neutral ships engaged in the coasting trade of the enemy, this Court does not give freight: But I think this rule has not been applied to voyages from the port of one enemy to the port of another. There have been cases in which the Court has given freight on such voyages, where there have not appeared any fraudulent or false proceedings in the conduct of the ship; and I think that voyages of this kind are very distinguishable from the other,—in those the freight is refused, because the parties have engaged in the coasting trade of the enemy, which was peculiarly and exclusively his own. This sort of traffic, from one of his ports to the ports of another country, has always been open, and is, in its own nature, subject to the uses of all mankind, who are not in a state of hostility with him. The *Dane* has a perfect right, in time of profound peace, to trade between *Holland* and *France* to the utmost advantage he can make of such a navigation; and there is no ground upon which any of its advantages can be withheld from him in time of war.

Freight and expences given.

July 16th,
1799.

Restitution in
value of a cargo,
found deficient.

THE CONCORDIA, BAYZARD Master.

THIS was a case of a petition to the Court, to allow a compensation for an embezzlement, said to have been committed by the captors, in goods which had been decreed to be restored on a former day.

For the Claimant, *Swabey* submitted—That the claimant was entitled, under a decree of restitution, to receive the goods as *per* invoice: that although it was sworn in the preparatory examinations that bulk had not been broken, it was found on attending to receive restitution, that in two packages there was a deficiency in the number of bales of linen, there being in one a deficiency of 17, in the other there being found 22 only instead of 52; it was prayed that it might be referred to the Registrar and merchants to estimate the value of the things missing, and that it might be charged on the captors, as the persons against whom the claimant was entitled to resort.

For the Captor, *the King's Advocate* submitted—That it was necessary to prove the goods were actually on board, that the bill of lading only mentioned the two cases without specifying their contents, that the invoice was not verified, nor on board, and not produced till the time of restitution, and therefore that there was not a sufficient constat that it contained the true representation.

Court.—There is an affidavit of the lader stating the quantity, and there is also an affidavit of the Mate of the *American* vessel, in which he swears that the Prize-Master demanded the keys and forced open the packages.

The

The King's Advocate then submitted—That the prize had been delivered up to the *Dutch* Commissioners, that if it was meant to affect the captors, there should be some affidavit, relative to the warehouse account of the Commissioners.

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Swabey.—The *captor* is liable by law.

Court.—The claimant must have his compensation in some way, either against the captor, or against the *Dutch* Commissioners; I think he has made out his case as to the deficiency, and it is not proper, that having so done, he should be obliged to come repeatedly before the Court to recover property taken from him. Are the captors or the *Dutch* Commissioners in possession? (It being answered by the King's Proctor that the *Dutch* Commissioners were,) Then I shall direct a monition against them, *to shew cause* why they should not make up the alleged deficiencies; for it appears to me to have been rather incumbent upon them to have set the matter right with the claimant in the first instance. If the original captor was in fault as to the embezzlement, I should have attended to any complaint made and supported by the Commissioners against him. But if the government, by its commissioners, take the property out of the hands of the captors, I shall not send the claimants in the first instance to hunt after these captors for a full restitution; but those who are in possession must make the restitution, and then call upon the captors to make good the deficiencies, of embezzlements happening whilst the cargo continued in their hands. It is not a thing becoming the justice of this country, that the subjects of other states should be put to inconvenience about the recovery

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of their property, merely because it has been taken out of the hands of the seizors to answer purposes of *British* convenience.

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1799.

THE RISING SUN, WILKYE Master.

Proof of property; effect of spoliation of papers as to farther proof.

THIS was a case of an *American* vessel taken, 10th June 1796, on a voyage from a *French* port ostensibly to *Altona*, but in reality bound to *Guernsey*; the ship had been restored 24th June, reserving the question of freight, demurrage, and expences.

The cause now came on, upon the property of the cargo, in which a question arose respecting the effect of a spoliation of papers.

JUDGMENT.

Sir *Wm. Scott*.—This is the case of a cargo of considerable value on board a ship that has been restored as an *American* vessel; a claim has been given for the greatest part as the property of the master; a small part has been claimed for the owner of the vessel, and a part for Mr. *Walter Seaman* a passenger on board; on the claim I must observe, that it is given in at a late period, and in very general terms; it might have been expected that the master being so large a proprietor, would have claimed for himself, and in a specific proportion; but the claim is given generally “for the owner and the master,” without distinguishing their respective shares. The Court was left to suppose they were claimants of undivided shares; in that case the claim would have been proper; but where the proprietors are not partners, it is certainly
not

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not proper to claim in that manner, but the respective interest should be specifically set forth. The witnesses in this case are, the master, Mr. *Walter Seaman*, and two others; many particulars have been pointed out as affecting the credit of the master, which do not make any very great impression on me. He says, "That part of the cargo was laden by himself," whereas the bill of lading describes other persons as the laders, but he might mean that it was done by his orders, and I should not consider that as materially impeaching his credit. The destination is also very inaccurately expressed, some of the papers describing it to have been to *Charleston*, others stating it to have been to *Altona*, whereas the true destination was to *Guernsey*; but as they are both neutral ports, I do not think there is much in that, more especially as it is the general practice not to allow a vessel to clear out for an enemy's port; but there is one fact, which does, I think, go very much to his discredit, and that is the spoliation of papers. It is admitted that there was a spoliation of papers; and the parties in that act were the master and Mr. *Walter Seaman*.

The master says to the 16th, "That there were eight or nine letters under the care of *Seaman*, but that he took them from him on the appearance of the chasing vessel, which he supposed to be a *French* vessel as it came from the *French* coast;" from which I am led to suppose, that they were letters which he had confided to *Seaman*, but took them from him on the apprehension of being chased by a *French* cruizer: but *Seaman* does not give a very ingenuous account of this matter: he says, "That he took the letters in port," not saying from whom he received them, therefore

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therefore I must infer that he received them from the master; there is no reason given for destroying them, and it has been justly observed, that if this is *American* property, and the letters applied to that, they would have been preserved as the best evidence to protect the cargo as *American* property, but that if the property belonged to merchants at *Guernsey* or to *British* merchants, there might then be good reason for such a suppression. It has been said in explanation, that they might be destroyed, that no contradiction might arise to the ostensible destination; but it is well known that although it is the ordinary form of clearing out from a belligerent country to bear an ostensible destination to a neutral port, yet no one imputes that as a fraud, nor is it considered as such an act as would justly subject neutral property, on board neutral ships, to be molested on that account; here then is a spoliation unaccounted for, and unexplained, traced home to the master of the vessel, who is also the asserted owner of a great part of the cargo; spoliation is not, alone, in our Courts of Admiralty, a cause of condemnation; but if other circumstances occur to raise suspicion, it is not too much to say of a spoliation of papers, that the person guilty of that act, shall not have the aid of the Court, or be permitted to give farther proof, if farther proof is necessary. Let us look then to the history of the case; the master came from *America* not long before in this ship, a vessel of about 200 tons, but without a cargo; he brought a letter of introduction from his owners, and instructions from them, but there is not the slightest trace of any fund for himself; there are two letters shewing that the *American* owners trusted to his

his discretion to obtain freight, and that he was directed to receive monies, due to them, from the *French* government, and if he failed in that, he had a letter of credit to a house in *London*, which was to assist him in managing his plans; but there is not the slightest intimation that he was to turn merchant on his own account; the ship came from *America* to *London* with rice; she then went to *Amsterdam*, and from *Amsterdam* to *Bourdeaux*, and from *Bourdeaux* with cotton to *Guernsey*, which she delivered to merchants there as the agents of persons in *London*; the merchant at *Guernsey* paid his freight, and they gave him besides 443*l.* with a power to draw on merchants at *Hamburg* for 12 or 15,000 livres, which he was to dispose of as he pleased on his own account; so that there is about 6000*l.* the greatest part in actual specie, with which they entrusted this man exposed to the risks of the sea, and to be employed as he should think fit: he went to *Bourdeaux* and took on board this cargo of brandy; and he farther says, "That if he had reached *Guernsey*, he was to have consigned the cargo to those merchants, and to have given them the commission, that they were to have taken 5 *per cent.* on the amount, and paid themselves out of the proceeds." Now this is so utterly incredible, that the Court must have the faith of ten men to believe it on the original evidence; the story is so excessively improbable, that nothing but the clearest case, in point of evidence, could induce me to restore the great part of this cargo which is claimed as the master's property; but when I find that all this has been connected with a spoliation of papers, and a spoliation by this man, and that there is not a scrap

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serap of paper on board shewing his correspondence with the persons at *Guernsey*; these circumstances connected with the other improbabilities are decisive, and do, I think, fully justify me to reject this claim.

With respect to the property of the owners, it would be going too far to say that they are precluded from farther proof. It appears that they are persons of property; the master was to receive the profits of some former freights in *France*; and it appears also, that he had made several freights for them, and that he was to have credit in *London*, with which he was to purchase wines at *Bordeaux*; all these circumstances give a fair foundation to this part of the case. It would, I think, be too hard to hold them concluded by this man's misconduct; the evidence of their property is not at present sufficient, but it may be restored on farther proof, and I shall direct farther proof to be made of their property.

With respect to Mr. *Walter Seaman*, I observe his claim is of small amount; and I should be unwilling to give him much trouble about it; but as he was in some degree concerned in this spoliation, and considering that he went on board at *Guernsey*, and that he appears not to have been so short a time in *Europe* as he represents, I think these are circumstances that require farther explanation; I shall direct farther proof to be made of his property.

It was submitted by the King's Advocate that as far as freight was concerned, the owners were legally bound by the misconduct of the master, by the spoliation of papers.

Court.—It is certainly the general rule.

Arnold.

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Arnold.—This is a case in which the owners were at a great distance, and no way privy to this act.

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Court.—It may be hard in many cases, but men must abide the consequences of their own misplaced confidence.
Freight refused.

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THE VROW JOHANNA, OKHEN Master.

July 18th,
1799.

THIS was a case of a ship taken 16th December 1799, and proceeded against for a breach of the blockade of *Amsterdam*, having sailed from *Petersburgh* for that port, November 6, 1798.

Blockade of
Amsterdam.

Court.—The cases alluded to of the blockade, set up by the *Dutch* in the wars of the last century, have no immediate application to this case: that was a blockade of the whole coast of their enemy, the present case stands on the question of a blockade of *Amsterdam*, and not of the coast. It is not denied that if a vessel sail for a blockaded port after having received notification of the blockade the act of sailing is to be considered as a breach of the blockade. The only question is then, Whether the blockade notified on the 11th June, and not revoked, is to be considered as continuing at this time? she sailed on the 6th of November. Am I to presume that the blockade so notified did not exist? I cannot presume it, nor could those concerned in dispatching the ship have entertained such a presumption. I hold it to be the duty of a country notifying a blockade, to notify the revocation also; there had been no such revocation noti-

fied,

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fied, and therefore I must presume that it was still existing. I hold, that a ship and cargo sailing for *Amsterdam* at that time are liable to condemnation.

Condemned.

On application of the agent for the cargo, that the Sentence respecting that might stand over for some inquiry, it was allowed.

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THE NEPTUNUS, HEMPEL Master.

Blockade of
Havre.

THIS was a case of a vessel sailing on a voyage from *Dantzick* to *Havre*, 26th October 1798, and taken in attempting to enter that port on 26th November.

For the Captors, the *King's Advocate* stated—That the ship was taken in attempting to enter a blockaded port in pursuance of her original destination, and was therefore liable to confiscation, unless some sufficient ground of justification could be shewn. That the master's averment of a general ignorance could not be received, in the case of a blockade notified by public declaration. That as to the particular information which the master pretended to have received from a *British* frigate in the *North Seas*, "That *Havre* was not blockaded," it was immaterial, as it came too late to discharge the penalty, which had been incurred by the act of sailing, and for which the vessel might have been seized by the frigate; that her course had not been altered in consequence of the information, and therefore that she

stood

stood exactly in the same situation as if she had never received it.

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JUDGMENT.

Sir *Wm. Scott*.—This is a case of a ship and cargo seized in the act of entering the port of *Havre* in pursuance of the original intention under which the voyage began. The notification of the blockade of that port was made on the 23d *February* 1798, and this transaction happened in *November* in that year; the effect of a notification to any foreign government (a) would clearly be to include all the individuals

(a) Respecting the effect of notification as to the subjects of those states to whom it was not directly made:

August 22, 1799. In the case of the *Adelaide, Rose*, a *Bremen* ship, which had sailed into *Amsterdam* from *America*, *September* 1798, and was captured in her voyage outward in *April* 1799, it was contended that the penalty did not attach; that by the master's evidence it appeared that he was ignorant of the fact; that he sailed in *September* from a distant country, without seeing any blockading force; that at the time of sailing outward he met with only that one ship, which seized him; that no notification had been made to the *Hans Towns*, and therefore as to them, it was a blockade existing *de facto* only, of which the master might be allowed to plead his ignorance; that the penal consequences of a notification given to one power, did not affect the subjects of another state that had not received any notification;—it was prayed that the claimant might be allowed to prove the *bona fide* ignorance of the master, and that no notification had been made of the blockade of *Amsterdam* to the *Hans Towns*.

Court.—This ship is proceeded against on account of having broken the blockade of *Amsterdam*. The Court has often decided that egress is as much a breach of blockade as ingress, if it be done fraudulently. The notification was made to different governments of *Europe* on the 11th of *June* 1798, this ship sailed in from *America* in *September* of that year ignorant of the fact;
but

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viduals of that nation; it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of foreign govern-

but it by no means follows from that circumstance that the blockade was raised, as it might be suspended by accidents which would not make it legally cease to exist: She proceeded to take in a cargo in the months of *November* and *December*, and sailed on the 24th of *April* 1799: The offence is, therefore, in the egress. That no notification was made to the *Hans Towns* is a suggestion of counsel, which makes no part of the affidavit. I will go so far as to accede to the position, that the notification would not affect such a case from the same time, and in the same manner, as it would affect the subjects of those states to whom it was directly made. But that it does not affect at any time is going too far; because, if a notification is made to the principal States of *Europe*, I think a time would come when it would affect the rest; not so much *proprio vigore*, or by virtue of the direct act, as in the way of evidence. It is the duty of a state to make the notification as general as possible. But I must think, that a time would come when a notification to neighbouring powers would affect those to whom it was not directly made: From the moment that a notification is made to a government, it binds the subjects of that state; because it is supposed to circulate through the whole country. But suppose a notification is made to *Sweden* and *Denmark*, it would become the general topic of conversation; and it would be scarcely possible that it should not have travelled to the ears of a *Bremen* man; and although it might not be so early known to him, as to the subjects of the states to which it was immediately addressed, yet, in process of time, it must reach him; and must be considered to impose the same observance of it on him: It would strongly affect him with the knowledge of *the fact*, that the blockade was *de facto* existing: Therefore, on these grounds, I should hold that although a notification does not *proprio vigore* bind any country but that to which it is addressed, yet, in a reasonable time, it must affect neighbouring states with knowledge, as a reasonable ground of evidence; and I think I do not strain the matter in laying down this rule. As to the circumstances of this particular case, at *Amsterdam*, it must have

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governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold therefore that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the Court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise, but this is the case of a blockade by notification; another distinction between a notified blockade and a blockade existing *de facto* only, is that in the former, the act of sailing to a blockaded place

have been a subject of general notoriety that the port was legally considered by the *English* in a state of blockade; and it is impossible that it should not have come to the knowledge of this man after he came in; it is not to be said by any person "although I know a blockade exists, yet, because it has not been notified to my Court, I will carry out a cargo." I cannot but think that it would have been a very fraudulent omission to take no notice of what was a subject of general notoriety in the place. If it was known to every *Dane* and *Swede*, it is impossible that it should not be known to this man. It is not more likely to have been unknown to this vessel, from the circumstance of its being a *Bremen* ship, when we consider the particular relation which *Bremen* bears to the Sovereign of this Country. As to the affidavit of the master, I should receive that with great distrust. Masters have a direct interest to raise the blockade as soon as possible; therefore their affidavits come with a dead weight about them, that must very much sink their credit whenever they are produced. I hold that the master must have known of the blockade, notwithstanding he and his men swear they did not; and therefore that the ship is penally liable to confiscation.

Ship condemned — Cargo ordered to stand over — Master's private Adventure restored.

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is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation: it may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse, for sailing on a doubtful and provisional destination. But this is a case of a vessel from *Dantzick* after the notification, and the master cannot be heard to aver his ignorance of it. He sails:—till the moment of meeting Admiral *Duncan's* fleet, I should have no hesitation in saying, that, if he had been taken, he would have been taken *in delicto*, and have subjected his vessel to confiscation; but he meets Admiral *Duncan's* fleet, and is examined, and liberated by the Captain of an *English* frigate belonging to that fleet, who told him that he might proceed on his destination, and who, on being asked, Whether *Havre* was under a blockade? said “It was not blockaded,” and wished him a good voyage. The question is, In what light he is to be considered after receiving this information? That it was *bona fide* given cannot be doubted, as they would otherwise have seized the vessel; the fleet must have been ignorant of the fact; and I have to lament that they were so: When a blockade is laid on, it ought by some kind of communication to be made known not only to foreign governments, but to the King's subjects, and particularly to the King's cruizers;

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cruizers; not only to those stationed at the blockaded port, but to others; and especially considerable fleets, that are stationed *in itinere*, to such a port from the different trading countries that may be supposed to have an intercourse with it. Perhaps it would have been safer in the *English* Captain to have answered, that he could not say any thing of the situation of *Havre*; but the fact is, (and it has not been contradicted,) that the *British* officer told the master "that *Havre* was not blockaded," Under these circumstances I think, that after this information he is not taken *in delicto*. I do not mean to say that the fleet could give the man any authority to go to a blockaded port; it is not set up as an authority, but as intelligence affording a reasonable ground of belief; as it could not be supposed, that such a fleet as that was, would be ignorant of the fact.

From that time I consider that a state of innocence commences; the man was not only in ignorance, but had received positive information that *Havre* was not blockaded. Under these circumstances, I think it would be a little too hard to press the former offence against him; it would be to press a pretty strong principle rather too strongly; I think I cannot look retrospectively to the state in which he stood before the meeting with the *British* fleet, and therefore I shall direct this Vessel and Cargo to be restored.

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Blockade of
Amsterdam.
Effect of terms
of a licence to
the ports of the
Vlie, &c.

THE JUNO, BEARD Master.

THIS was a case respecting the meaning and effect of a licence, granted to an *American* ship to go to the ports of the *Vlie*.

JUDGMENT.

Sir *Wm. Scott*.—This is a case arising out of the blockade of *Amsterdam*; it is a case of an *American* vessel coming from *America* without any knowledge of the blockade of *Amsterdam*, and bringing a cargo for that port; she came to *Falmouth*, and then, finding that the port of *Amsterdam* was under blockade, she petitioned for a licence, and obtained one from this government, and, as I understand the master through the whole of his depositions, “a licence to go to *Amsterdam*.” This he states in stating his difficulties, and the means he took to relieve himself. The application was “for leave to export to the *Vlie*, *Embsen*, or *Rotterdam*,” but the terms of the permission are an enlargement of his petition, for they are “to the ports of the *Vlie*, *Embsen*, *Rotterdam*, or *elsewhere*.” Whether the petition was an imposition, and framed with a design of deceiving government, will appear on the enquiry which has been directed to be made. If the petition was in the usual form, and if the licence was understood by those who granted it to permit exportation to *Amsterdam*, it will clear up that part of the case; as to any opinion that I can form, I own, that although the licence is expressed in this general way, “the ports of the *Vlie*,” I cannot but think that it must have included *Amsterdam*, which is one of those ports; for it is not to be supposed but that they would intend

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intend to grant the licence in a natural and intelligible form, and not so as to keep the parties in the dark as to its extent. But it is argued, that, allowing it to have been properly obtained, it was not properly used; because it was at any rate a licence to go to *Amsterdam* through the *Vlie* passage, whereas this vessel was taken entering the *Texel*; and that there might be many reasons for making the distinction in the licence, and therefore that it ought to be strictly observed. Now having heard it constantly argued, and having myself adopted the interpretation, that the blockade extended to one passage as well as to the other, and that the whole *Zuyder Zee* was shut up; I shall not go back again and restrict this interpretation, and say it is confined to one passage only. I shall hold *e converso*, that if a licence is given to go through the *Vlie*, it is not substantially violated by going through another passage, unless it is shewn to me that it contained some specific prohibition as to other passages: supposing it to have been honestly obtained for *Amsterdam* through the *Vlie*, I shall not hold it to have been a material deviation to go another way, unless some special prohibition, or unless some special inconvenience is shewn, which the party was bound to take notice of.

It has been truly said, that a licence is a thing *stricti juris*, a *privilegium*, which a man does not possess by his own right, but that it is conceded to him as an indulgence, and therefore, that it is to be strictly observed. At the same time, I am to remember, that this is a licence to relax a right which bears pretty hardly, though justly, on other countries. To shut up the ports of a country, and exclude neutrals from all commerce with it, is a great inconvenience

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upon them, although it is one to which they are bound to submit; for there is no one principle of the law of nations better established, than that a belligerent has a right to impose a blockade on the ports of his enemy; it may be incommodious to others, but, if there is any such thing as a law of nations, I hold this principle to be as firmly established from the earliest times, and by the general practice of mankind, as any one law whatever: it is, however, a harsh right, and though a licence is a privilege, I am not disposed to apply that exposition in the strictest manner to a blockade, but rather think that licences in such a case are to be favourably regarded, and that it imports the good faith and honour of the government which grants them, not to press the letter too rigorously. I will go farther, and say that if I was convinced that there had been an honest mistake on such a matter; if there appeared nothing insidious, nothing more than a misapprehension on the part of the neutral master, I should not apply too strictly, the maxim *ignorantia juris non excusat*, against a foreigner mistaking the exact meaning of a licence of another country; and in so doing should persuade myself that I did no more than what an equitable regard to the honour of the country which granted such a licence must be supposed to require.

The licence is, "To carry a cargo to the ports of the *Vlie* or elsewhere," with several provisions, amongst which there certainly is no proviso that she shall come out again; but that is a benefit incidental to the licence, and inseparable from it; for it cannot be imagined that she was to go there, and be shut up and incarcerated, and become herself an object of the blockade. A ship that has entered previous to the blockade may
retire

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retire in ballast, or taking a cargo that had been put on board before the blockade; this is the distinction which I have held, and shall hold, till I am corrected by a Superior Court. The licence is silent on that point; but having said, that if I was convinced the party acted under an honest application of his licence, though erroneously, I should think him entitled to the most liberal interpretation, it will be proper for me to consider what the man did, that I may see, supposing that there has been a mistake, whether it was a mistake of honest conduct, purely erroneous and innocent; thinking, that, if it is so, it would be sufficient for the present case. The master takes the returned cargo on board, and comes to a port of this kingdom, and solicits the protection of a convoy, acting as openly and with as little concealment as possible; there is nothing in the *res gesta* on which the imputation of fraud can be fixed. Is there any thing in the licence to instruct him, that he was not at liberty to take a cargo, or to act as if the blockade was, in regard to him, entirely relaxed? If so, he would be bound to take notice of it; but I see this distinction, which might reasonably affect the mind of a man going in under such a licence;—he goes in under the direct authority of the belligerent, and might suppose his privilege more extensive than that of a neutral vessel previously there. A neutral has no right to say, I am here accidentally, and therefore I have a right to take out a cargo notwithstanding the blockade; but this man goes in with a permission, which takes off, as to him, the first and primary object of the blockade, the prohibition of taking in a cargo; and I think he might conceive himself to be entitled to be distin-

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guished from the ordinary case of other neutrals previously there. If any inconvenience is likely to arise from this; if government did not mean that his licence should have this effect, it might have been distinctly expressed; the proviso might have been inserted, that he should not bring a cargo away; and then all persons would see a clear path before them, and know how to conduct themselves in this very delicate situation.

On the legal effect of such a licence, it is not necessary for me to determine. I see no fraud in the interpretation of this licence, and if it turns out that this was the form in which licences were usually granted, I shall not think myself warranted to say that this man was guilty (if guilty at all,) of any thing more than an innocent misapprehension; and in a matter, in which I shall hold such a misapprehension to carry no consequences of penalty after it.

July 24th, 1799. This case having stood for inquiry, as to the usual form of granting licences, the King's Advocate said, he had obtained no particular information, but that after what had fallen from the Court he did not mean to press the matter any farther.

Ship restored.

July 25th,
1799.

Verification of
papers by carrier-masters, in
what degree
required.

In the same Case,

On the hearing as to the cargo, July 25, 1799, the *King's Advocate* contended—That it must go to farther proof, unless all the rules of practice were broken down; that goods shipped in the enemy's country
were

were to be considered *prima facie* as the property of the enemy, and could only be taken out of that presumption by fair and unbiassed evidence, and not from evidence supplied only from the enemy: That the bills of lading and attestation in this case were of the latter description, put on board by the enemy shipper; whilst the master, who was always expected to verify his papers, to the 12th Interrogatory says only, "that the laders of the cargo were *Hollanders*; and farther he cannot depose."

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On the part of the claimant, *Laurence* argued—That if farther proof was to be required in this case, it would be impossible for owners of cargoes put on board carrier ships, to obtain restitution in any case on the original evidence; as a carrier master could not be so particularly acquainted with the several owners, or know anything of their course of trading, so as to enable him to swear to their property; that the bill of lading expressed account and risk, and there was an attestation of property on board; and that the master, swearing to the 13th and 27th interrogatories, "that all his papers were true, and that he knew of nothing to affect their credit," did in effect afford a sufficient verification.

JUDGMENT.

Sir *Wm. Scott*.—The present application to the Court is to dismiss a cargo taken on board in *Holland*, on the ground that the proof in the case is sufficient according to the practice, or what ought to be the practice of this Court. I presume it will not be contended, that no proof is necessary in the case of a cargo taken on board in the enemy's country; and

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where there is *no* proof arising from the documents or the depositions,—the Court is not to consider so much what that proof ought to be, as what is required by the practice of the Court; for I sit here, not as a legislator, but to administer the law that I find existing: If a reform is necessary, it must be sought elsewhere: The Court is neither to make law, nor apologise for it.

The rule is, as I have always understood it in the Court of Admiralty, that papers by themselves prove nothing;—they are a mere dead letter, if they are not supported by the oaths of persons in a situation to give them validity. Those who look back to the elaborate exposition of the proceedings of our Courts of Admiralty, in the answer to the *Prussian* Memorial, will find this to have been laid down as a fundamental position, “that the master must verify his papers.” It is true that, in the case of a carrier master, it may be expected that the verification should be less positive, than where he is himself the agent; but *this* is expected, that he should depose at least that *he believes* the cargo to be as asserted in the claim; less than that I never remember to have been accepted in any case;—and if it were necessary for me to apologise for the rules which I find established in this Court, I think this might be vindicated on every principle of reason and justice. When a cargo is taken on board in an enemy’s port, and that port blockaded, (which is a circumstance of some weight, as affording a greater temptation to fraud,) if the master is not required to say even *that he believes* the property to be as claimed, it would open the door to every sort of abuse: But it is said, the master does

go this length, in swearing "that all the papers are true," and that this amounts to a verification of the property;—so he does, if you take that part of his deposition substantively, and apart from the rest; but looking to other parts, and finding, that when he is asked on the 12th interrogatory, what he knows *or believes*? (for he is examined to his belief,) he can depose nothing, and that he has no belief, it is impossible to say that this man's deposition confirms the papers, in the manner in which it is necessary that they should be supported. It is said there are other papers which supply this defect,—the attestations of the laders before the *American* Consul. What authority has an *American* Consul to administer an oath to *Dutch* subjects? Such papers can hardly be taken as sworn documents, or if they were, they come only from the *Dutch* shippers, the very persons, who, if there is any fraud, have been the contrivers of it. Under such circumstances, Can it be reasonably or candidly addressed to the Court to restore this cargo immediately and without farther proof?—This ship goes under licence to a blockaded port, with a cargo addressed to one set of merchants only—here are various parcels for a variety of different persons, the master evidently knowing nothing of the matter, and there being no proof but from the *Dutch* laders; I must say that I am not satisfied; the rules of the Court require farther proof, and I feel that it is a rule which I could not relax without relaxing the essential demands of justice.

Arnold prayed freight and expences for the ship to be a charge on the cargo.

Court.

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Jury.

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Court.—I am of opinion that the master is entitled to his freight and expences on two grounds; if he had taken no cargo, he would not have been liable to be stopped; and secondly, having received this cargo so improperly documented on board, he would have been liable to have been stopped on that account, although he had not been coming from a blockaded port.

Freight and expences given, and to be a charge on the cargo.

July 19th,
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THE HURTIGE HANE, DAHL Master.

Breach of blockade of Amsterdam: Excuse, asserted distress; how received.

THIS was a case of a *Danish* ship taken in the act of entering the *Texel*, April 1799, having sailed from a port in *Barbary*, with an asserted original destination to *Hamburg*, February 15, 1799.

It was prayed that the Court would permit a protest of the master to be read, in which it would appear, that he was under the necessity of going into the *Texel* from distress and want of water; and that his crew rose upon him, and insisted that he should go into some *Dutch* port.

Court.—This ship was found in the act of entering the *Texel*, a fact by no means indifferent, but highly criminal, *prima facie* at least, and requiring a very satisfactory explanation. It is usual to set up the want of water and provisions as an excuse; and if I was to admit pretences of this sort, a blockade would be nothing

nothing more than an idle ceremony. Such pretences are, in the first instance, extremely discredited on two grounds—that the fact is strongly against them, and that the explanation is always dubious, and liable to the imputation of coming from an interested quarter. I am not deaf to the fair pretensions of human testimony, but, at the same time, I cannot shut my senses against the ordinary course of human conduct; I will not say that cases of necessity may not occur that would afford a sufficient justification; and I add, that if the party can shew that they were under any great necessity, and that, for four or five days before, they could get into no other port but the *Texel*, I would certainly admit such an excuse, so supported. But if they cannot do this, and unless it is proved, that in coming up the *Channel* there was no other port either *English* or *French*, but the interdicted port of *Amsterdam* into which they could put, I shall reject the apology.

The protest of the master, the mate, and cook was admitted to be read, which set forth ‘ Their voyage to *Saffee* in *November*; that, during the time they lay there taking in a cargo, they suffered much by bad weather, and were several times driven out to sea; that on the 15th of *February* having completed their lading, the bad weather increasing, they were obliged to cut their cable and proceed on their voyage, leaving the anchor buoy and cable behind them; that on the 25th the wind blew very hard with a heavy sea; that the sea broke over their vessel, and forced the ring-bolts from out the deck, washed away the quarter-boards with two water casks, and did a great deal of other damage;

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‘mage; that on the 16th day of *March* they met
‘with another heavy gale of wind, which obliged
‘them to lie to under their lower sails, that the
‘foresail and schooner sail were blown out of the
‘ropes, and they were obliged to cut them away and
‘bend new ones; that the sea was so great it made
‘a free passage over the vessel, which caused her to
‘labour and strain very much, and she proved so
‘leaky, they were obliged to keep the pump con-
‘tinually at work; that on the 21st day of *March* they
‘moved the cargo to find out the leak which was at
‘the bottom of the ship near the foremast, and after
‘cutting away the inside planks they fortunately found
‘and stopt the leak; that on the 23d they saw *Scilly*,
‘and on the 28th passed *Dover*, and next day the
‘weather was very bad with snow and frost; that on
‘the 2d of *April* they arrived off *Yarmouth* near the
‘sands, the wind then blowing a hard gale at east;
‘that they were obliged to set all the sail the vessel
‘could carry, in order to clear the sands; that on the
‘5th their topsail was blown away, and the wind was
‘so violent that they were obliged to cut away the
‘jib, and the shrouds and deck were covered with
‘snow and ice, and it was with great difficulty they
‘could work the vessel, and next day all the crew
‘came to the master and told him, as they were in
‘want of provisions and water, (they having been
‘under short allowance for some time,) and the said
‘vessel wanted repairing, that they desired him to
‘proceed to the nearest port, and if he did not they
‘would take the command from him; that he was
‘under the necessity of complying with their request,
‘and accordingly steered for *Holland*.’

Court.

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Court.—I have now heard the proof brought in, and I am to determine whether it comes up to the test which I have laid down, and to which I shall certainly adhere, that nothing but an absolute and unavoidable necessity will justify the attempt to enter a blockaded port; considerations of an inferior nature, such as the avoiding higher fees, or slight difficulties, will not be sufficient—nothing less than an unavoidable necessity which admits of no compromise, and cannot be resisted, will be held by me to be a justification of this offence.

The master sails under a knowledge of the blockade, being affected with the general notification of the preceding year; on the 28th of *March* they passed *Dover*, on the 2d of *April* they were off *Yarmouth*; but although the protest is made to justify the master from barratry and the crew from mutiny, and does therefore, I must presume, contain all facts necessary for that purpose, I do not see that it is stated that they were going into *Yarmouth*. If on the 3d of *April* there is so much want of water and provisions as to compel them to go into the interdicted ports of the *Texel*, Why not go to the open and permitted port of *Yarmouth* on the 2d of *April*? It is not alleged that the discovery of such a want was first made on the 3d—on the next day, the weather becoming more violent, the crew came to the master and insisted on going into the nearest port on account of want of water and provisions; a third excuse is thrown in, that the ship wanted repair; but this is not mentioned in the depositions, and it appears not to have been a very pressing want, as the ship came afterwards back to *England* without difficulty; they insisted on going into the
nearest

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nearest port, saying, that they would otherwise take the command from him. It does not appear where this happened, nor is it stated that the crew insisted on going to *Amsterdam*. The master should have said, "the *Texel* is shut up, I will go to any other port:" He does not seem to have felt this necessity in an equal degree with the rest of the crew; as he represents himself "to have been forced in reluctantly." What was there then to carry him to this one interdicted port only? or what reason was there that he could find no other than this, either a little to the north or south? Is there that inevitable necessity which is required? If such pretences as this were to be admitted, I know very well, that no one case would come unprovided with an excuse. I shall condemn this vessel; if the parties think themselves aggrieved, they must take the benefit of another Court.

Ship condemned.

On application for the master's private adventure,
Court.—Strictly speaking, perhaps it ought not to be granted in this case;—but as I wish to shew this description of men every degree of indulgence, I shall recommend it to the captors to consent to it.

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-1799.

THE WELVAART VAN PILLAW,
BOTTER Master.

Breach of blockade of *Amsterdam*, a vessel having escaped the blockading force.

THIS was a case of a *Prussian* ship, taken *April* 1799 off *Dungeness*, and proceeded against for a breach of the blockade of *Amsterdam*, having sailed from thence with a cargo in *March*.

For

For the claimant, *Laurence* said—That there was an affidavit offered by the party, to shew the ignorance of persons at *Amsterdam*, as to the blockade of that port, till the second notification * was published there 12th *April* 1799; but as the Court had determined that It should consider the notification of *June* preceding to be still in force till it is recalled, it was unnecessary to mention that affidavit farther than to form a ground of exception on appeal. It was farther said, that the matter of the affidavit was aided by the circumstance of the capture not having been made by any blockading force, nor near the mouth of the port, which raised a strong presumption that the blockade was not actually kept up; that the rule which the Court had laid down respecting the continuance of a blockade by notification, applied to neutral states and ships going in; that in respect to ships coming out of a blockaded port, the nature of a blockade prevented vessels lying there from having any other notice than the fact; and that, if the actual blockade was not kept up in force, they had no other reason to presume a continuance, and were not *in delicto* for coming out as this vessel did, when there was no ship lying near the port to prevent her.

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* Vid. infra.
p. 131.

JUDGMENT.

Sir *Wm. Scott*.—There seem to be two grounds on which something of an indulgence is claimed in the present case. It is said that it was not a matter of notoriety in *Amsterdam* that the blockade was still continued; that a notification is addressed to neutral states, and therefore that a ship in the blockaded port may plead ignorance. But I am to remember that this is not a *Dutch* ship but a *Prussian* ship,

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ship, and that it was the duty of the *Prussian* government, having received the public notification many months before, to have communicated it to their subjects in different ports. Another circumstance on which exemption is prayed, is, that she had escaped the interior circumvallation, if I may so call it, that she had advanced some way on her voyage, and therefore that she had in some degree made her escape from the penalties. I cannot accede to that argument; if the principle is found, that a neutral vessel is not at liberty to come out of a blockaded port with a cargo, I know no other natural termination of the offence but the end of that voyage. It would be ridiculous to say, if you can but get past the blockading force, you are free:—this would be a most absurd application of the principle. If that is found, it must be carried to the extent that I have mentioned; for I see no other point at which it can be terminated. [Vide *Bynkers. Q. J. P. lib. i. ch. 11. (a)*] Being of opinion that the principle is found, I shall hold, that if a ship, that has broken a blockade, is taken in any part of that voyage, she is taken *in delicto*, and subject to confiscation.

(a) *Bynkershoek* is commenting on the order of the States General, 1630, in these words: In tertia sanctione eleganter distinctum est, in quem portum naves exeuntes fuerint compulsæ, ut nempe in ipso actu deprehensæ videantur, nam si in eum portum in quem destinarent, pervenerint, absolutum iter intelligitur, & cessat publicatio. Sed ait disjunctim, “*haar eigen of daar de reyse gedefineert was*,” de quorum sensu, & jure, dubitari posset: Sane si proprius portus, et in quem destinatum erat, iidem sint, res quidem caret omnidubio: Sed si *Anglus*, qui ex *Flandria* destinaret in *Daniam*, in portum *Anglicum* compellatur, & enavigans, iter suum prosecuturus, deprehendatur, antequam portum *Danicum* subierit, mihi quidem in itinere & ipso actu videretur deprehendi, nec quicquam interesse portus proprius sibi, nec ne, quem ante subierat, si non iter, quod institutum erat, plane fuerat finitum.

THE JONGE PETRONELLA, KENS Master.

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THIS was a case of a *Danish* ship which had sailed from *Rotterdam* on the 28th *March* 1799, and was proceeded against for a breach of the blockade of the ports of the United Provinces, notified to foreign ministers on the 21st *March*, and inserted in the Gazette on the 26th *March* 1799 (a).

Blockade of the
ports of the United
Provinces,
21st *March*
1799. Time for
communication.

Court.—There seems to be no question made as to the property of the ship; I do not think a week is sufficient time to affect the parties with a legal knowledge of this blockade, I shall therefore restore this vessel.

Cargo reserved.

(a) *Downing-Street, March 21, 1799.*

“The King has been pleased to cause it to be signified by the Right Honorable Lord Grenville, His Majesty’s Principal Secretary of State for Foreign Affairs, to the Ministers of Neutral Powers residing at this Court, that the necessary measures having been taken by His Majesty’s commands for the blockade of the ports of the United Provinces, the said ports are declared to be in a state of blockade, and that all vessels which may attempt to enter any of them after this notice, will be dealt with according to the principles of the law of nations, and to the stipulations of such treaties subsisting between His Majesty and Foreign Powers, as may contain provisions applicable to the cases of towns, places, or ports, in a state of blockade.”

July 23d,
1799.

THE TWO SUSANNAHS, BRAREN Master.

Proceeds of sale
less than amount
of original value.
Compensation
not allowed, in
case of justified
seizure; and
conduct not im-
peached.

THIS was a case on a prayer for compensation in value, for a cargo taken on board a *Danish* ship, restored on farther proof 17th July 1799, on a suggestion that the amount of the proceeds was considerably less than the original value.

Court.—This is an unfortunate case; the Court is very desirous that full justice should be done to the claimants, but the cargo is not equal to it; there is no question about the seizure,—that is justified by the order for farther proof: The question is then, Whether the captors have acted so irregularly as to make themselves liable? It is said that it was very desirable that the cargo should be brought here, and that it has been exposed to accidents by carrying it elsewhere. It was however carried to *Leghorn*, where there is a standing commission of the Admiralty Court. It is said, that loss has been occasioned by selling it too early. Perhaps it might have been better if they had waited; but there is no suggestion that the sale was made for any sinister purposes, or in any manner injurious to the property. Under these circumstances, I cannot think that the captors are answerable for more than the proceeds, it not being shewn that they have conducted themselves otherwise than with fair intentions.

THE PACKET DE BILBOA,
DEPUCHETA Master.

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THIS was a case of a claim of an *English* house, for goods shipped on board a *Spanish* vessel, by the order of *Spanish* merchants, before *hostilities with Spain*, and captured *December 1796*, on a voyage from *London to Corunna*.

Shipment at the risk of consignee till delivery; allowed—as being made before the war. Particular mode of *Spanish* trade.

JUDGMENT.

Sir *Wm. Scott*.—This is a claim of a peculiar nature for goods sent by *British* subjects to *Spain*, shipped before hostilities, during the time of that situation of the two countries, of which it was unknown, even to our government, what would be the issue, between them. There appears to be no ground to say, that this contract was influenced by speculations on the prospect of a war, or that any thing has been specially done to avoid the risks of war. It is sworn in the affidavit of the claimant, “That this is the constant habit and practice of this trade;” whether it is the practice of the *Spanish* trade generally, or only the particular mode of these individuals in carrying on commerce together is not material, as the latter would be quite sufficient to raise the subject of this claim. The question is, In whom is the legal title? Because, if I should find that the interest was in the *Spanish* consignee, I must then condemn, and leave the *British* party to apply to the Crown for that grace and favor which it is always ready to shew; the property being condemnable to the Crown as taken before hostilities.

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The statement of the claim sets forth, that these goods have not been paid for by the *Spaniard*;—that would go but little way,—that alone would not do; there must be many cases in which *British* merchants suffer from capture, by our own cruisers, of goods shipped for foreign account before the breaking out of hostilities. It goes on to state, “That according to the custom of the trade, a credit of six, nine, or twelve months is usually given, and that it is not the custom to draw on the consignee till the arrival of the goods; that the sea risk in peace as well as war is on the consignor, that he insures, and has no remedy against the consignee for any accident that happens during the voyage.” Under these circumstances, in whom does the property reside? The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect; but that general contract of the law may be varied by special agreement, or by a particular prevailing practice, that presupposes an agreement amongst such a description of merchants. In time of profound peace when there is no prospect of approaching war, there would unquestionably be nothing illegal in contracting, that the whole risk should fall on the consignor, till the goods came into possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal, that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper. In time of war this cannot be permitted, for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor,

signor, where it suited the purpose of protection; on every contemplation of a war, this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture; it is therefore considered to be an invalid contract in time of war; or, to express it more accurately, it is a contract which, if made in war, has this effect; that the captor has a right to seize it and convert the property to his own use; for he having all the rights that belong to his enemy, is authorised to have his taking possession considered as equivalent to an actual delivery to his enemy; and the shipper who put it on board during a time of war, must be presumed to know the rule, and to secure himself in his agreement with the consignee, against the contingency of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea risk, and he has nothing to do with the case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment, and throws it upon the shipper, the shipper must be supposed to have guarded his own interests against that hazard, or he has acted improvidently and without caution.

The present contract is not of this sort; it stands as a lawful agreement, being made whilst there was neither war nor prospect of war. The goods are sent at the risk of the shipper: If they had been lost, on whom would the loss have fallen but on him? What surer test of property can there be than this? It is the true criterion of property, that, if you are the person on whom the loss will fall, you are to be considered as the proprietor. The bill of lading very much favors this account. The master binds himself to the shipper,

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shipper, "to deliver for you and in your name," by which it is to be understood that the delivery had not been made to the master for the consignee, but that he was to make the delivery in the name of the shipper to the consignee, till which time the inference is, that they were to remain the property of the shipper: as to the payment of freight, that is not material, as in the end the purchaser must necessarily pay the carriage:—The other consideration, Who bears the loss? much outweighs that,—neither does the case put shew the contrary. The case put is—supposing *Spain* and *England* both neutral, and that these goods had been taken by the *French* and sold to great profit, to whose advantage would it have been? The answer is, If the goods were to continue the property of the shipper till delivery, it must have enured to his benefit, and not that of the consignee. To make the loss fall upon the shipper in the case of the present shipment, would be harsh in the extreme. He ships his goods in the ordinary course of traffic, by an agreement mutually understood between the parties, and in nowise injurious to the rights of any third party; an event subsequently happens which he could in no degree provide against. If he is to be the sufferer, he is a sufferer without notice, and without the means of securing himself; he was not called upon to know that the injustice of the other party would produce a war before the delivery of his goods: The consignee may refuse payment, referring to the terms of the contract which was made when it was perfectly lawful; and under what circumstances and on what principles the shipper could ever enforce payment against the consignee is not easy to discover.

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The goods have never been delivered in *Spain*; they were to have been at the risk of the shipper till delivery, and this under a perfectly fair contract. I must consider the property to reside still in the *English* merchant; it is a case altogether different from other cases which have happened on this subject *flagrante bello* (a). I am of opinion that, on all just considerations of ownership, the legal property is in the *British* merchant, that the loss must have fallen on the shipper, and the delivery was not to have been made till the last stage of the business, till they had actually arrived in *Spain*, and had been put into

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(a) In the *Noydt Gedächte, Waalrave*, 23d August 1799, which was a subsequent case of a small *Dutch* fishing vessel, transferred to the neutral claimant under a condition to reconvey at the end of the war.

The Court.—A sale made by an enemy to neutrals in time of war, must be an absolute unconditional sale: This transfer is evidently done only to cover the property during the war. The vessel continues in the old trade, and is in every respect a *Dutch* vessel.—As to the cargo,—The value of the property is very small; and it would be of very little benefit to any party to send the case to farther proof: I must therefore dispose of it according to the preponderancy of the present evidence. The master, who, I must say, has spoken very ingenuously, says “that the consignees reside at *Dort*; that he believes the laders have an interest in the cargo now, but that it would become the property of the consignees on the arrival at *Dort*; and he gives his reason for this belief, that the lader told him so,”—on this authority the master undertakes to swear that he believes it to be property of the persons for whom it is claimed. It has been settled by repeated decisions that this will not do—that neutrals should take upon themselves the sea risk and danger of the voyage, will not be allowed. In opposition to what the master states, there are only two certificates, which do not, I think, meet the point. What is there sworn may be very true; and yet the master’s account true at the same time. I am inclined, therefore, to adhere to the master’s account; and, under it, I must condemn this cargo as *Dutch* property.

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the hands of the consignee; and therefore I shall decree restitution of the goods to the shipper.

On prayer that the captor's expences might be paid, it was answered that they had already had the benefit of the condemnation of the ship.

Court.—I think there has been a great service performed to the shipper. If the goods had not been captured, they would have gone into the possession of the enemy. The captor did right in bringing the question before the Court, and he ought by no means to be a loser.—I shall not give a salvage, but shall direct the expences of the captor to be paid out of the proceeds.

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THE MARGARETHA MAGDALENA,
PREDBORN Master.

Trade from the colonies of the enemy. Ship and cargo from *Batavia* to *Copenhagen*, on account of *Danish* merchants, restored: Effect of contraband in the outward voyage.

THIS was a case of a ship and cargo seized at anchor in *St. Helena*, September 1798, on a voyage from *Batavia* to *Copenhagen*, and claimed for merchants of *Copenhagen*.

JUDGMENT.

Sir Wm. Scott.—This is the case of a ship asserted to be a *Danish* vessel, and coming with a valuable cargo from *Batavia* to *Copenhagen*. It is well known that the *Dutch* were reduced to extreme distress in the exportation of the very valuable produce of that settlement; that circumstance alone would be sufficient to raise a general suspicion against a trade of this kind; at the same time it must be acknowledged, that it would be sufficient only to authorize search and enquiry, without

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out subjecting the ship to any detention for adjudication, unless the general suspicion was still farther aided by other circumstances; it is for the Court to enquire, Whether these suspicions are so aided in the present case? The papers are very full and circumstantial, and all concur in describing the ship and cargo to be *Danish* property; they are supported by the master, who appears to have been entrusted with a discretionary power to go to *Batavia* or not, according to the result of an enquiry that he was directed to make at the *Cape of Good Hope*. It would be difficult, therefore, in this case to say, what sort of farther proof the Court should require if it was disposed to order it; the outward voyage was contingent, and not absolutely to *Batavia*. It does not appear that there must have been any correspondence with persons there, for the whole was entrusted to the master. It would be difficult, therefore, to say what the Court should direct to be produced; and this difficulty would operate with me as one reason against making such an order, unless there were peculiar grounds of suspicion to make it necessary.

It is certainly an alarming circumstance in this case, that, although the outward cargo appears to have consisted of contraband goods, yet the principal owner appears publicly at *Copenhagen*, and makes oath, "That there were no prohibited goods on board, destined to the ports of any party now at war;" the master himself describes the cargo that he carried out as "naval stores;" and on looking into the invoice I find that they are there represented as "goods to be sold." That being so, I must hold that it was a most noxious exportation, and an act of a very hostile character,

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character, to send out articles of this description to the enemy, in direct violation of public treaties, and of the duty which the owners owe to their own government. I should consider it as an act that would affect the neutral in some degree on this returned voyage; for although a ship on her return is not liable to confiscation, for having carried a cargo of contraband on her outward voyage, yet it would be a little too much to say that all impression is done away; because, if it appears that the owner had sent such a cargo under a certificate obtained on a false oath, that there was no contraband on board, it could not but affect his credit at least, and induce the Court to look very scrupulously to all the actions and representations of such a person. The master says, "That there was not more than was necessary for the ship's use;" but this practice is, even with this apology, sufficiently alarming, because it has appeared that other ships have been employed in carrying naval stores to *Batavia* in the same manner; not as principal cargoes, but in moderate quantities, under pretence of stores for the ship's own use, but which, nevertheless, were sold, as these were on their arrival at *Batavia*; it is apparent that the enemy may be supplied in this mode to a very great amount.

What the master says in another place, is rather contradictory to this pretence; he says, "That there was not more than would be wanting for another ship which he had a design of purchasing at *Batavia*." Now, I must say that it could by no means be allowed, that neutrals shall be at liberty to carry out a larger quantity of articles of this nature than are wanting for their own ship's use under a speculation
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of purchasing other ships, and that when they are there, the speculation shall be relinquished, and the contraband articles be then sold as stores in the colonies of the enemy. If the speculation was originally really and *bonâ fide* entertained, on failure of it, the surplus should either be brought back again, or sold in some neutral port of that quarter of the world; for neutrals can have no right to carry out double stores of this description for a contingent purpose, and then dispose of them to the enemy at their pleasure. The master says, "That he was authorised to purchase a ship;" but there is no appearance of such a commission in the papers, nor are there any documents relating to it; the articles were entered in the invoice as being for sale, and the fact has actually taken place, that they were sold at *Batavia*. The owner swears that there were no prohibited goods destined for any of the parties now at war. It is not clear from this expression, whether he meant to swear that it was not for the port, or not for the use of an enemy; it is a very equivocal term—it was certainly going to an enemy's port, and if it was to be sold there, in failure of the speculation of purchasing a ship there, it was then for the use of the enemy. Upon the whole, I think there was great reason to bring this case to adjudication; it was a case very proper for enquiry. But after all the enquiry that has been made, I am of opinion that the property of the ship is sufficiently clear, and that there is nothing pointing to any other than a *Danish* interest in the cargo. If I saw on board any thing of the nature of what has appeared in some other cases from *Batavia*, I should certainly look a little farther into

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it; but it appears to me that the outward shipment from *Copenhagen* was sent under the management of the master to invest the proceeds in the produce of *Batavia*. If the general nature of the transaction has rendered it liable to suspicion, I can only say that it is a trade in which it is the duty of neutrals to observe a conduct perfectly circumspect, and consistent with all obligations of good faith. But I am, under all the circumstances, satisfied that the property is as claimed, and I direct it to be restored.

August 16th,
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Trade from the colonies of the enemy. Produce of *Vera Cruz*, going from that Settlement to *Hamburg*, the property of neutral merchants, restored.

THE PROVIDENTIA, HINCH Master.

THIS was a case of a ship and cargo, having been stopped in a *British* port, 17th *March* 1799, on a voyage from *Vera Cruz* to *Hamburg*, and claimed for merchants of *Hamburg*.

For the captor, *King's Advocate*.—This is a claim for a ship and a very valuable cargo going from the *Spanish* settlement of *Vera Cruz* to *Hamburg*, on behalf of merchants of *Hamburg*. In the papers there is nothing appearing to affect the property of the ship and cargo; but it is to be considered that the claimant in this case has been a frequent claimant during the war, and must be a gentleman of much experience in the practice of these Courts; and therefore it is not to be wondered at, that all the documents are found regularly in order and prepared; there is, however, something in the character and conduct of the master in this business, that does raise a very reasonable sus-

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picion on this ground of property. When he was first called upon for his papers he refused to deliver them up till he had consulted his correspondent in town, and the captors were obliged to take out a monition against him for the purpose of obtaining them: there is, besides, something peculiar in his character and situation; he is a young man of twenty-five years, who appears to have been engaged principally, before this voyage, in travelling into *Spain* and *England*, for the purpose of acquiring languages; he then goes to *Hamburg*, and without having handled a rope, for any thing that appears, he is made master of this vessel, and entrusted with this very important commission to the *Spanish* colonies,—a trade for which he might have had abundant opportunities of forming secret arrangements in *Spain*, and in which he is more likely to have been employed in fact by *Spanish* merchants than for these gentlemen of *Hamburg*, for whom the present claim is given.

These observations go to the question of property; but it is perhaps unnecessary to agitate that question in the present case, as there is a more important question of law involved, on which, it is submitted, this ship and cargo will be liable to confiscation. It is scarcely necessary to say, that this is the principle of law that was applied to the colonial trade of the enemy in the war of 1756; and which has never since been departed from by this country: The principle was not, as it is sometimes represented, founded on the circumstance of adoption into the enemy's trade by virtue of special licences or passes; but it rested on the broad ground of interposition in the trade of a belligerent, which had not been before open. That this

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this is the foundation of the law, appears from this circumstance, that in the course of that war the use of licences was laid aside, yet still the property taken in that course of trade was made subject to condemnation. Another expedient was also resorted to, of sending the produce to *Monte Christi*, in the first instance, and of taking it from thence, without going at all to the *French* islands; but still that was considered as an evasion, and confiscation still followed.

That the trade with the *Spanish* colonies was not an open trade, and that it was an object of great jealousy and monopoly to the *Spanish* government, appears evidently from the instructions to the master in this case: "He is first directed to obtain a special permission from the *Spanish* government to go to *Vera Cruz*; and, if it should be required of him to return back to a *Spanish* port, he is to represent it to be impossible, because in that case they would be taken by the *English*;" and he is to use every means, "by presents to the governors, to prevent it; he is to use his utmost endeavours to be allowed to clear out for *Hamburg*, and at worst to pay the *Cadiz* duties." It appears, therefore, that the danger of capture was in view, and an object of chief consideration with all parties; and therefore it is, that this expedient of giving bills on *Hamburg*, conditional on a safe return, is resorted to; it is a case, therefore, that comes expressly under the principles, of the war of 1756. These are sound principles and have never been abandoned by this country: Circumstances had occurred to occasion an opening of the *French* colonial trade before the present war; but the *Spanish* colonial trade has ever continued an object of great jealousy, and

and has never been opened to foreign ships, and therefore as to them the old principle still applies in full force.

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For the claimants, *Arnold* and *Laurence*—The refusal of the master to deliver the papers on the first application has been so far explained, that it is allowed to have proceeded from mistake rather than from any consciousness of a fraudulent case; no imputation therefore arises from that circumstance that requires any answer. As little occasion is there to vindicate the character of the man from the suspicions thrown upon the former part of his history; whatever were his engagements in *Spain* it is not probable that they had any connection with this case: The very dates are sufficient to refute such a charge; he lived at *Hamburg* till 1791; his travels into *Spain* took place between that time and 1796—a period when *Spain* was in alliance with us, and when therefore it was not very likely that fraud should have been concerted against this country. In 1796 he returns again to *Hamburg*, and it was not till two years after his return that he sets out on this voyage—a very tardy execution truly of any fraudulent trade, for which he must be supposed to have made his arrangements long before; there is nothing therefore to impeach the claim, unless the principle of law which has been started, can be maintained as applicable to this case. The practice of the war of 1756 has been relied on; and it is said, that although vessels under a special licence were condemned as vessels adopted into the enemy's trade, it was not solely on the ground of the special licence that this principle was sustained:—but it must be remembered that the principle was first set up, to meet the cases of ships sailing under those special licences, and if it was afterwards extended

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to ships without licences, or to cargoes taken from *Monte Christi*, it was merely in prosecution of the same purpose, of counteracting the fraudulent trade of the enemy, which had first shewn itself under the contrivance of these special licences, and of which the later practices were but a variation for the purposes of evasion; it did therefore stand principally, and in its origin, precisely on the circumstance of adoption by means of these licences; and this will still farther appear, if it is considered that before that period, in the war of 1744, ships taken on a voyage from the *French* colonies, were released before the Lords of Appeal.

But if it were granted that the interposition in the trade of a belligerent, not before open to foreign traders, made some part of the principle of that war; it would not apply to the cases of this war, for in the late practice of this Court during this war, there have been a variety of cases from the *French* and *Dutch* colonies, in which the Court has either ordered farther proof, or restored in the first instance, by no means considering them, therefore, as concluded by this circumstance. It is said that this has happened from a variation of facts only, and that circumstances had occasioned a general opening of the *French* colonial trade before the war—but that is not correct; for the opening of the *French* trade was not till four days after the declaration of the war by the decree of the Convention; the previous opening having been only occasional, and under a discretionary power granted to the governors, for the purpose of obtaining supplies, and preventing the danger of famine—a sort of relaxation directly tending to shew, that they were not generally open, and carrying with it a direct refutation of the argument, attempting to raise a distinction for the

the legality of the *French colonial* trade, as arising out of any *previous* alteration in their system. It is said that no such alteration had taken place in *Spain*;—but it certainly had; and though the *Spanish* colonies had not been thrown open so soon as the *French*, yet they were opened before the breaking out of hostilities between this country and *Spain*, as will appear by the order to our cruizers, in which the trade from the *Spanish* colonies is expressly mentioned, being considered evidently, as a trade equally allowable, as the trade from the *Dutch* or *French* colonies, and standing on the same footing, whatever that may be.

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But it is said that the evidence in this case affords proof to the contrary; and that it comes within the more strict class of cases which occurred in 1756; as there is that special licence to be found in this case—but there is no such licence on board; the King's Advocate relies on the words of the instructions to the master, but they by no means import such a special licence, nor is there any trace that the persons engaged in this business ever conceived that they were engaging in an unlawful trade. The Court has an opportunity of seeing every thing relative to this vessel, as well with respect to her outward, as to her homeward cargo. The voyage to *Vera Cruz* is not mentioned as a thing uncertain, nor as a matter of experiment; there appears to have been no hesitation or doubt in the parties, whether they should be permitted to go to the *Spanish* colonies or not, it is mentioned in all the papers as an object fully in their own power; the instructions are given in the most unreserved manner, "That if cochineal and indigo were cheap at the *Havannah*, the master was directed to purchase there," speaking of it

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as a trade by no means new to the parties. "But if he could not get any thing but sugar, for which the vessel would be too small, he was to get a pilot, and proceed to *Vera Cruz*, taking particular care first to obtain the governor's licence;" but this is perhaps a licence necessary for *any* ship going there, in the nature of a Custom-House clearance, and not to be considered as a licence, granting a particular exemption from the general restrictions of the colonial trade;—the prices and commodities are all specifically mentioned;—shewing again, that the accomplishment of their object was not a matter of contingency, nor of uncertainty and doubt to the parties.

It appears that a general proviso of *Spanish* licences was "to return to a *Spanish* port," and that it was a great object with the parties to prevent this condition; all means were to be used to obtain a licence for *Hamburg*, and at the worst the master was to pay the *Cadiz* duties. From this it appears what was the motive of this restriction—that the permission to go to *Vera Cruz*, is to be taken as a ceremonial to which all foreign vessels, and perhaps all *Spanish* vessels are subject, for the purpose of securing to the *Spanish* government this duty; in this case the master had complied, and had obtained a certificate, stating in general terms that he had paid the royal duties, and pointing to no specific favor or indulgence. This is the fair import of the licence that is spoken of in the instructions; but whatever might be its nature, it would not of itself be conclusive after the case which has occurred in this Court, in which although a bond was found on board obliging the master to return to *France*; yet notwithstanding it appearing in evidence on the master's oath that he did not intend to return to *France*,

but that he was actually going to *Gottenburgh*, that property was restored. On these grounds, therefore, it is submitted, that this vessel was found in a trade not unlawful—that the proofs of property are full and satisfactory; that there being no ground of detention the parties are entitled to restitution; but farther, that as they have sustained great loss by this seizure, a loss imposed on them without reason and without cause on their part—they are entitled to a full indemnification (a).

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JUDGMENT.

Sir *Wm. Scott*.—This vessel was seized in the harbour of *Penzance* in *Cornwall* on a voyage, not disputed, from *Vera Cruz* to *Hamburg*. It appears that the master shewed some reluctance in delivering up his papers, or at least in submitting them to inspection, which has been attended with much inconvenience to himself, as it has furnished grounds of suspicion and argument against him; I do not, however, see much ground of accusation against him; it

(a) On a subsequent day, *August 7, 1800*, the demand for compensation for loss sustained, owing to the low price of sales, came on to be heard on petition. The principal loss was stated at the difference of the prices of the markets of *Hamburg* and *London*. But it was answered, that the original prayer on the part of the claimants was to bring the cargo from *Penzance* to *London* for sale,—that a wish was expressed by them to sell in a private manner, rather than by public sale; and bail was offered to the amount of the invoice price only:—This being not acceded to on the part of captors, the proposal went off; and the cochineal was sold at last in *London* by the agent, after restitution. In the argument a material question was started, Whether the King, in his office of Admiralty, would be subject to cost or damages? But the Court being of opinion that it was a case of justifiable seizure, and fit to be brought to adjudication, and that the damage which had been sustained was owing to the conduct of the parties themselves, or their agents, dismissed the petition without entering upon that point of law.

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is not the case of a man refusing to submit to a lawful cruizer of this country at sea, but it is a case of a man coming into a port, and there meeting a person claiming as deputy of Lord Mount Edgcumbe Vice-Admiral of *Cornwall*, under the sanction of a commission, which a neutral master might not very well understand: that there was any particular reason of disengenuous craft for such a refusal on his part I do not see, as it is admitted that the evidence of the property of the ship and cargo is complete. The destination also is fully proved; there could be no reason, therefore, for withdrawing the papers from inquiry; something has been said respecting the character of the master, that he is a young man, and had lately been travelling in *Spain*, both founding a suspicion that he does not stand in this trade in the character of master of a neutral vessel: but I see no reason why, because he united rather a larger scope of information, he might not also be competently acquainted with the navigation of a vessel: there is no appearance here of that strange animal, a captain of the colours, or captain of the flag, or any character of that kind; he travels previously to the year 1796, but this voyage does not begin till 1798, and I do not think that his travels are likely to have given rise to any fraudulent proceedings in this case; I shall therefore take the case clear of any objection of that sort, and consider it only as a question of law as to the legality of such a trade, Whether a neutral ship can lawfully go from her own port in *Europe* to the colony of an enemy, and there lade a cargo and return with it to her own port?

On this point much has been said on the policy and general reasoning of restricting the trade with
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the colonies of the enemy during a war; this is a wide field, into which I shall not enter any farther than is necessary; I shall look principally to the King's instructions to his cruizers as the safest guide for this Court to follow; all reasoning on general principles on this subject depends much on facts of a very dubious nature, not sufficiently known here, either to the Counsel or to the Court; and as the superior Court has not given any rule for the direction of this Court, I shall think it the safest method to adhere to the King's instructions, and extract from them what I conceive to be the meaning of them.

The first instructions were, to bring in all ships which had been trading with any colony of the enemy: but this country afterwards receded from these directions; and the second orders were, "to bring in all ships laden with the produce of the *West India* islands, coming directly from the ports of the said islands to any port of *Europe*. I cannot but consider this as an abandonment of the former law, and I cannot but think that a cruizer taking this instruction, in conjunction with those which had been given before, must have inferred, that it was no longer the intention of government to bring in, and much less to confiscate, cargoes of *West India* produce, unless coming to some port in *Europe*: this was followed by instructions now in force, which direct the bringing in of all vessels laden with the produce of the *French* and *Spanish* settlements coming directly from the ports of such settlements to any port of *Europe*, *other than the ports of that country to which the vessel belongs*. It is certainly not laid down in the negative that they shall not bring in such vessels as are coming from such settlements to their own ports; but looking

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August 16th,
1799.

6th November
1793. See
Appendix.

8th January,
1794.

25th January
1798.

The
PROVIDENTIA.

August 16th,
1799.

at the former instructions, I think it was a strong admonition to cruizers not to bring in such ships, and I believe it has been generally so understood and acted upon by them; and in this Court, cargoes brought from *Surinam* to ports in *Europe* to which the vessels belonged, have been uniformly restored on proof of the neutrality of the property.

If then this is so intended, On what ground is it to be contended, that this ship and cargo, being admitted to be going to *Hamburg*, are subject to condemnation? The only ground on which it has been argued, is the special licence from the *Spanish* governor; and it is said that it was intended only to allow the trade to such colonies as were generally open, and not to those where a special pass is necessary. But where do I find that distinction in these instructions? If it was so intended, it ought to have been expressly inserted as an exception; there is nothing in the general terms to direct neutrals to such interpretation; it would be, therefore, to operate with surprise upon them, and to mislead them into a trade to their own undoing to put such an interpretation upon the King's instructions; unless it can be shewn, that it was the particular meaning of the instructions to except vessels under this licence, I must hold, that it is not in the terms of them to inquire whether they are going with a pass or not—so I understand them; and till I am instructed to the contrary by the superior Court, I shall so interpret them, as importing a general permission, and as not affected by the special licence, the law being simple and universal in its language, and there being nothing to lead me to think that there was any such reserve in the mind of the legislature.

But

But I am no way satisfied, if it were necessary for me to go farther, that there is such a licence in this case; the licence should necessarily be such a one as connected itself with the circumstances of this war, giving permission to a ship to go where she would not be allowed to go in time of peace. If it was only a remission of colonial forms—I do not think it would be such a licence as could support the argument which has been raised upon it in this case. It has, I think, been admitted, and it has appeared in this case and others, that the *Havannah* is generally open, but that *Vera Cruz* is the *sanctum sanctorum* of the *Spanish* settlements, and watched with peculiar jealousy; and I am not sure that even *Spanish* vessels do not require something of a permission from the government to legalize a voyage from one country to another;—the reference to the *Spanish* governor of the *Havannah* seems to have been made as a matter of course in the ordinary conduct of all trade to *Vera Cruz*, as a sort of clearance to authorise the voyage. As to the condition to return to some port of *Spain*, which, from his paying the *Cadiz* duties, it is said, might be imposed upon the master, I see nothing in that which will particularly affect him, after the various cases from *Surinam*, in which, although bonds had been given to return to *Holland*, this Court has restored, on the masters making satisfactory proof that they did not intend to comply with the condition, and intended to submit to the penal forfeiture. I cannot say there is any thing in this circumstance that can subject this cargo to confiscation.

Cases respecting the trade of neutrals with the colonies of the enemy are of considerable delicacy; and therefore I think it has been properly brought before the Court. But I restore both ship and cargo.

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1799.

August 9th,
1799.

A case of property. Effect of an attempt of a neutral to cover enemy's property, as to goods mixed up with it, &c. &c. Fraudulent destination in colonial trade.

THE CALYPSO, SPECK Master.

THIS was a case of a ship and cargo taken 13th February 1799, on an asserted voyage from *Cayenne* to *Hamburg*, and claimed for Mr. *Beckmann*, and Messrs. *Ecchardt* and Co. of *St. Thomas*.

JUDGMENT.

Sir *Wm. Scott*.—The Court has very frequently to lament that its duty often calls upon it to condemn the property of neutral merchants on some strict principle of law. The circumstances of this case most effectually relieve it from such concern; for it is a case that I may safely pronounce to be poisoned with fraud in every vein; and the Court feels a satisfaction in executing that duty which it owes to the general interest of mankind, in reprobating and exposing such practices: The truth of this transaction cannot be better described than in the words of one of the letters found on board: "In short, the most artful tricks that can be devised to elude the enquiries of the *English*, must be put in practice; for they must not discover the real destination to *Cayenne*." That is the text,—and it appears to have been followed up with as much zeal and industry as could possibly be exercised.

The first point that I shall consider is the property of the vessel; on this great doubts arise, by which I mean, not arbitrary doubts, but legal and judicial doubts; such as must make a reasonable impression on every one that attends to the evidence of the case: as a case of simple doubt, it must be a case for further proof. It is an *American* vessel under the name

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name of the *Lady Walterstorff*, (a singular name for an *American* ship,) said to have been purchased at *New York* by Mr. *Beckmann*, of *St. Thomas*, in 1797; from whom the purchase was made does not appear, it is nowhere mentioned in the papers, the master knows nothing of it; she might therefore have belonged to a *French* owner, or to one of those locomotive fugitive persons, whose character, like Mr. *Beckmann's*, it may not be very easy to determine. A master is put on board, of a character no less equivocal, he is represented as a *Danish* subject—but when at home always resides at *New York*. It may be proper also to consider the character of the asserted proprietor Mr. *Beckmann*, who was the first purchaser, but afterwards transferred a part to Mr. *Ecchardt*; according to the master's account he resides at *Hamburg*, but in fact, we find him *every where* but at *Hamburg*—he is at *New York*, at *St. Thomas*, at *Cayenne*; *Paris*, and *Rochelle*; there is no evidence mentioning his connection with *Hamburg*, but the deposition of the master—a person certainly not entitled to entire credit, the papers all describe *Beckmann* and *Ecchardt* as *incolæ hujusce insulæ, i. e. St. Thomas*, under this contradictory evidence, therefore, seeing that in the course of this transaction he appears at *New York*, *St. Thomas*, *Cayenne*, *Rochelle*, and *Paris*, and nowhere else, and that the master describes him as resident at *Hamburg*; it would be impossible for me to pronounce him to be a *bona fide* resident merchant of that place; and the least that the Court could do would be to require farther explanation of the mercantile situation of this gentleman; as to the other asserted proprietors in this business, their
national

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national character is not impeached—but I cannot go the length contended for, and consider them as persons so pure and purged of all possible *mala fides* as has been represented. When I find them appearing before the magistrate at *St. Thomas*, 1st August 1797, and making oath, “That the destination of that voyage was to *Surinam*, and from thence to *Hamburg*,” although I am satisfied in my own mind, that there never was the least intention of going to *Surinam*, I cannot think them entitled to all the panegyric that has been bestowed upon them; I have said that there was no intention of going to *Surinam*, and for proof of this I refer to the master’s answer to the 7th interrogatory, where he says, “That he went from *New York* to *St. Thomas*, and there took in a cargo for *Surinam*, but was, in the course of the voyage, forced to go into *Cayenne* by a mutiny of his crew.” But I observe that when they are there, the cargo is immediately sold, and by Mr. *Beckmann* the owner, who was on board;—this circumstance is, in my opinion, sufficient to prove the falsehood of the asserted destination to *Surinam*; why a crew going to *Surinam* should choose to force their way into *Cayenne* is not very easy to conjecture—it is near *Surinam*—a most unhealthy place, and what is not in itself very attractive, without some special reason to neutrals, a very unsettled *French* colony at this time. But suppose an owner carried in by mutiny and force; the first step would naturally have been for such an owner to have proceeded in some way against such delinquents: He does nothing of the kind, but immediately sets about selling the cargo with all possible composure and activity, and acts throughout like a man extremely willing to submit to the force put upon him.

There

There is too much reason to conclude that the whole was a matter of the same contrivance that appears to have been attempted to a like effect in the subsequent voyage (a).

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As to the papers, they are in no degree authenticated, the pass is not that described by the master, he says, "It was obtained on *his* oath." This instrument does not so describe itself, but appears to have been granted on the oaths of *Ecehardt* and *Beckmann*, therefore the papers are by no means duly verified by the master; and if they were, it would not be too much to say that his evidence could not give effectual aid to any transaction whatever; I need not travel back far to find that he has been guilty of direct perjury in his former management of the concerns of this ship, and as for the late merit claimed for him from his disclosure, I can give him little credit for it considering the circumstances under which he has appeared; when we find him stained with perjury in *August* 1798, to give him credit for pure and unblown integrity in *January* 1799, is neither a moral or legal way of estimating the credit of men; the master being discredited and the papers unverified, it would of course be a case of further proof at the best, with respect to the ship, considered upon the evidence applying merely to itself and independently of any connection with the cargo. But I do not think that the Court is limited to this view of the transaction only without considering the circumstances relating to the cargo as they stand connected with the character and employment of the vessel, because the use and occupation of a vessel are

(a) In the last outward voyage to *Cayenne*: The master on 7th Interrogatory.

extremely

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extremely proper to be considered; for if the whole of the *res gesta* shews the parties to have been habitually, and throughout this transaction, employing the ship in fraudulent purposes, it must very materially affect their claim to farther proof respecting the property of the ship. It has been said that false papers will not, by the law of this Court, necessarily lead to condemnation if the proof of property is clear; and that papers false as to the destination, will not stand in the way of restitution, under the practice of the Admiralty of this country. It has been said also, and truly, that the evidence respecting the cargo does not generally affect the ship; as it may frequently happen that the owners of the cargo will, from lust of gain, put on board false papers without the knowledge or privity of the owners of the ship: But it is a very different case when the ship and cargo belong to the same persons; and although I will not say that false papers would, even in such a case, necessarily lead to condemnation of the ship, yet when the first case is only a case of farther proof, false papers put on board by the common owners of both ship and cargo cannot but very materially affect their claim to that indulgence: What then have been the habits of this vessel? As to her employment it will not be contended that it has not been fraudulent throughout. In the first part of the history of this ship we find her sailing from *St. Thomas* ostensibly to *Surinam*, but putting into *Cayenne* with Mr. Beckmann her principal owner on board, and, as it appears evidently, I think, from other circumstances, by his concurrence and contrivance. From *Cayenne* she sails again, on a pretended destination to *Hamburg*, but puts into *Rochelle*, with Mr.

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Mr. Beckmann still on board, and the cargo is there disposed of.

That Mr. Beckmann went to *Hamburg* or held any intercourse with that place no where appears, except in the evidence of the master; that he went to *Paris* at this time is certain, and he appears to have entered into a charter-party for this vessel to go to *Cayenne* and back, making oath that she was going to *St. Thomas*: By what salvos it is that persons of any education, or of any credit, make such oaths, I am yet to learn; but the fact is, that they swear the destination was to *St. Thomas*, at the same time that the vessel is sailing under a contract to go to *Cayenne* and back again to *France*. Instructions are put on board also, as artfully drawn, for the purposes of fraud, as it is possible for man to conceive; be a man's talent or genius for falsehood what it may, I defy him to fabricate a fraud more ingeniously than it is done in these instructions;—that they were not without effect is evident, as the ship was stopped by an *English* frigate and released.—So documented the ship goes again to *Cayenne* under a pretended force from the *French* government; the fact being, that it was her true and original destination—the outward cargo is there sold and a returned cargo taken in, documented in the bill of lading as the property of Beckmann and Ecchardt, though it appears from concealed papers that have been since produced; that the greatest part belongs to a number of *French* merchants, and that only a small part is in fact the property of these persons; now it is said that all the papers are to be taken together, and it is insisted on, as a reasonable rule, that in cases where some papers are

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are produced at first, and others kept back, you are to suppose the papers not produced to state the true and exact measure of interest. I allow that all the papers are to be taken together, but I cannot go so far as to admit that concealed papers are to be taken as necessarily containing the truth, because if such a rule was established as a principle of this Court, it would let in an infinity of fraud and make it the easiest thing in the world to protect the chief bulk of property in any case by giving up some part upon the pretended disclosures contained in these concealed papers. The more reasonable rule would be, that where there is one set of papers admitted to be false, and another set coming out of the same hands, that the whole is thrown into a state of uncertainty and doubt. It is said that *Beckmann* was a stranger to this part of the transaction, but I think that cannot be maintained; he knew the manner in which this voyage begun; he was the person sending out the vessel with fraudulent papers, and on a false oath, and that he should not know how the returned cargo was to be conducted, is not very naturally to be conceived; it would require great charity to believe that *Eschardt* and Co. were not also privy to the whole design: I have already pointed out some papers which seem to me to connect them very closely with the fraud. But if it were not so, if they were entirely ignorant of the matter, I must adhere to the rule laid down, (without which, the greatest frauds would be easily practised on the Court;) that where persons put their property into the hands of their agents and partner, as the agent is in this case, they must be bound by the consequences of his acts, as to the property so intrusted

intrusted to him. If they put the vessel into his hands and allow him to employ it as he pleases, whether they are immediately cognisant of his practices or not, they are affected with a legal privity, and that will be sufficient to dispose of their interest in her. Looking then to the whole of this transaction I ask, Is this a case that, according to the principles on which this Court has proceeded, I can refer to farther proof? I am clearly of opinion that it is not. But I will go farther, and say, that I have no hesitation in delivering my opinion, that if it appeared in evidence to be neutral property in the clearest manner; still, if it was proved that the ship was going from the mother country of the enemy to their colony under false papers and a false mask, and coming back again to the mother country, that she would be subject to confiscation. On every principle of justice the employment of a vessel in this manner, not only to carry, but to *cover* and protect enemy's colonial trade from the just rights of war, is such a gross departure from neutrality, that I should have no hesitation to condemn expressly on this ground; but that is not necessary—the ground on which I condemn is, that gross leaven of fraud which runs through every part of the transaction and contaminates the whole case; even on the neutrality of the property.

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CALYPSO.

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1799.

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THE HOFFNUNG, BERENS Master.

Act 39 G. 3.
c. 98. respect-
ing liberation of
ships bringing
Spanish wool,
does not super-
sede proceeding
by captors be-
fore the Court of
Admiralty on
other grounds.

THIS was a case turning principally on the interpretation of an Act of Parliament, 39 *Geo. III.* cap. 98. respecting ships importing *Spanish* wool; Whether the power given to his Majesty's Council to release such ships superseded the jurisdiction of the Prize Court, on other grounds of enquiry that might be taken by captors?

The licence was dated on the 21st *March* 1799, being the date of the notification of the blockade of *Holland*; but as that was not noticed in the terms of the licence it was made a question on the part of the captors, Whether the licence to import *Spanish* wool from *Holland* was to be taken as exempting them from the blockade? and farther, as to the property, it was submitted, that as it was a ship asserted to have been purchased in *Holland*, but having no bill of sale on board, it was clearly on that ground, a case of farther proof.

On the other side *Laurence* contended on the part of the claimant of the ship,—That the power of the Court of Admiralty to proceed against this ship was precluded by what had already passed; that she came under the description of vessels whose release was provided for in a special manner by the stat. 39 *Geo. III.* cap. 98; that this vessel had obtained her release in a summary manner, under that form, and was therefore not now liable to be proceeded against on a question of property, or blockade.

JUDGMENT.

JUDGMENT.

Sir *Wm. Scott*.—The first thing that I shall do will be to lay out of the case all question of blockade; on the ground that the licence is granted on the same day when the notification stated the blockade to commence; for I think I am bound to presume that it was intended the parties should have the full benefit of importing these articles, without molestation from a blockade, which could not be unknown to the great personage under whose authority, and in whose name this licence issues. I add farther, that I think this licence bears very materially on some other licences which had been previously granted; for when I see that the blockade was not considered as a ground for withholding these licences, I am led to suppose, that it was not intended to have the effect of suspending the operation of such as had already been granted.

The question of blockade being disposed of, Is there any thing else that puts the case in an unfavourable situation? It is said, that the property of the cargo is not proved,—on this point it is indubitable that the King may, if he pleases, give an enemy liberty to import: He may, by his prerogative of peace and war, place the whole country of *Holland* in a state of amity; or, *a fortiori* he may exempt any individual from the operation of a state of war; but I apprehend, that unless there are very express words to this effect to be found in the licence, I am to consider its meaning, as not going to that extent, but as giving such a liberty only to *subjects of this country*; it is a licence “to *British* subjects” to import, &c. and as I understand it, they are to import *on their own*

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HOF RUNG.

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1799.

account (a); and if it appeared that the importation was on the account of other than *British* merchants, I should hold, that under the terms of this licence, it could not be considered to be a legal importation. I must say, however, that there is nothing in this case, that shews the terms of the licence were not sufficiently complied with, and therefore I restore the cargo.

The question then remains as to the ship; and that question might not be without its effect upon the cargo; for certainly a licence to import in a neutral vessel, would be no licence for an importation in an enemy's vessel; at the same time this Court could hold that it was sufficient for the protection of the *British* importer of the cargo, if the ship was visibly, and to all appearance, neutral. A merchant cannot look further: He cannot be supposed to look into the title deeds of the ship; and though this Court, by its power of enquiry, might be able to detect enemy's interests lurking therein, still that would not be allowed to affect the cargo, unless the importer, or his agent, could be directly affected with the knowledge of that fraud.

With respect to the ship, one question arises on an act of parliament, 39 *Geo. III.* cap. 98. It is a ship bringing commodities for the manufactures of this country; and certainly the Court would not, as it has been said, be disposed to press any thing more strictly against a ship in such a service, than it is bound to do: At the same time, a ship coming into our port as a neutral vessel, but being really not so,

(a) In the *Beurse Van Koningberg*, February 27, 1800, [introduced as the next case,] this question came more immediately before the Court.

cannot be said to come under the faith of a licence; she can in no degree be compared with the cases mentioned of ships coming under a flag of truce: They come in a known and avowed character; there is no concealment or abuse. But if an enemy's ship comes under a licence granted only in terms to neutral vessels, she abuses the licence, and must be considered not as coming on the faith of this Government, but as endeavouring fraudulently to take the benefit of a licence to which she is not entitled.

The
House of Commons

August 30th,
1792

Before the passing of the Act in question it had been usual to encourage the supply of this article of great necessity, by granting licences to "A. B. or his agent, or bearer of the bill of lading, to import Spanish wool in neutral bottoms:" But it is said that this mode was attended with inconvenience; and therefore on application to the legislature, this act was passed.

On the first clause nothing particular arises; and I may perhaps be going out of my way to say any thing upon it. At the same time, it may be attended with convenience to merchants to know, that it appears to this Court to be exposed to some degree of doubt and difficulty. There can be no disposition in this Court (as there certainly ought not to be), to pass light observations on Acts of Parliament: At the same time it is known that particular acts of parliament are not always modelled and drawn up by persons sufficiently acquainted with, or attentive to, the state of the general law to which the new regulations are to apply. It rather appears to me, that the persons procuring this act have not entirely secured themselves from an inconvenience of this nature:—The words of the act are,

The
Horseburg.

May 10th,
1799.

“Whereas by an act, passed in the thirty-third year of the reign of his present Majesty, amongst other things, to prevent traitorous correspondence with his Majesty’s enemies; and by several subsequent acts, trade and intercourse is prohibited between *Great Britain* and the Countries in hostility with his Majesty, unless such trade and intercourse shall be specially permitted by his Majesty’s licence and authority: And whereas, for the encouragement of the manufactures of this country it is expedient to permit the importation of *Spanish* wool from any place whatever, in ships or vessels belonging to any kingdom or state in amity with his Majesty, Be it therefore enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful to and for any person or persons to import into this kingdom *Spanish* wool from any port or place whatever in foreign parts, in any ship or vessel belonging to any kingdom or state in amity with his Majesty; any thing in the said act, passed in the thirty-third year of the reign of his present Majesty, or any other act or acts of parliament, to the contrary in any wise notwithstanding.”

Now by this, it appears, as if the whole illegality of the trade, and the penalties belonging to it, arose out of those special provisions of the legislature; for the preamble points merely to those acts of parliament, and the *non obstante* in the conclusion points generally to Acts of Parliament. Yet it is perfectly well known, that independently of these, or any other Acts of Parliament, it is unlawful by the general

maritime law of this realm, which prohibits such commerce; this clause exempts persons from the penalties of *those particular acts*, but if there are other penalties by the common maritime law, which considers that trade as illegal, and punishes it by confiscation of the goods, it will not be easy to point out how this clause takes off that illegality, and the penalties attached to it; or at least it must be admitted, that it leaves some question of interpretation, in a case where no such question, nor the danger of any such question ought to exist. The question more immediately before the Court arises on the second clause.

The
MORNING.

Aug 20th,
1799.

“ II. And be it further enacted, That in case any ship or vessel having on board any *Spanish* wool, has been or may be detained, and it shall appear to the satisfaction of the Lords of his Majesty's Council that his Majesty's licence was granted for the importation of such *Spanish* wool before such detention, it shall and may be lawful for the said Lords of his Majesty's Council, and they are hereby authorised and required to order and direct the immediate restoration of every such ship or vessel, and all such *Spanish* wool, under the aforesaid circumstances, to the respective owner or owners, or proprietor or proprietors thereof.”

Now that it should be the intention of the legislature to say this, that by putting on board any ship whatever a bale or two of *Spanish* goods, that ship should be protected to any extent, can hardly be maintained, unless there were very clear and express words to that effect; for by such an interpretation the whole navigation of the enemy might be protected. That the Court of Admiralty should be obliged to

*The
Hoffnung.*

*Agst acth,
1799.*

shut its eyes to every circumstance respecting a vessel, except its having a bale of *Spanish* wool on board, seems not a very natural intention on the part of the legislature; more especially when we look to the terms of the first clause, which describes the indulgence to be meant only for the ships of persons at amity; and the two clauses must, I think, by fair construction be taken together.

If there is a captor before the Court who takes upon himself to aver that a vessel is not neutral property, I cannot think that I am not at liberty to examine that question; and I am more strengthened in this opinion, when I look back to the words of the Act, and construe it by the Order of Council; the Order of Council declares the importation to be according to the licence—the licence is for “*importation in neutral ships*,” and the Act directs “*the immediate restoration of every such ship under the aforesaid circumstances*.” If ships are *not neutral ships*, then they are *not under the aforesaid circumstances*. The Order only declares the licence to have been granted, and directs the restitution, as far as the *Spanish* wool was concerned, leaving all other questions still open, and the neutrality of the ship remains still examinable by this Court, at the application of the captor. If the party is dissatisfied with my interpretation, he will recollect that the Courts of Common Law are the most effectual expositors of Acts of Parliament.

Adverting then to the facts of the case, the master is ignorant of the built of the vessel, but she appears to have been purchased in *Amsterdam* by Mr. *Hillary Bauman*, a great purchaser of ships, who handed it
over

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over almost immediately to his son; she continued under the former master, in the *Dutch* trade; I think it is not too much to say, that there is that reasonable suspicion of the continuance of *Dutch* interests in this vessel, which calls for farther elucidation.

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HOFFNUNG.

August 20th,
1799.

On 26th *June* 1800. On production of farther proof, the Court said, The doubts are not absolutely cleared away; but considering the smallness of the value, and the manner in which the ship first came into this port, under a licence, I shall restore it.

THE BEURSE VAN KONINGSBERG, SHEMILLS, Master.

February 27th,
1800.

THIS was a case on the claim of Mr. *Robarts*, a *British* merchant, for a quantity of *Spanish* wool imported under a licence from *Spain*.—An objection being taken by the *King's Advocate*,—That the claim did not express the property of the claimant, nor negative enemy's interest.—It was said for the claim, That it was in the same form as many other claims in which restitution had been obtained.

Terms of the licence respecting *Spanish* wool to A. B. importer and holder of his bills of lading, not meant to exempt a claimant under licence, from negating enemy's interest in his claim.

Court.—Perhaps the claimant will not object to amend his claim,

This not being acceded to.—The cause came to be argued.—For the captors, the *King's Advocate*,—In this case the articles in question are claimed for Mr. *Robarts*, but the bills of lading express accounts and risk

The
BEURSE VAN
KONINGSBERG

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risk of merchants in *Altona*. It is a claim (a) perfectly novel in its form; as it not only does *not* assert *British* property, but as it does not even assert neutral property, or negative the interest of an enemy: it is said, that Mr. *Robarts* claims under the terms of the licence “as *Importer and holder of the bills of lading*, and that he is entitled to restitution in that character. The whole question will depend then on the terms of the act, in conjunction with the licence, and if they have not been properly pursued, the goods imported under it, in trade with the enemy, will be subject to confiscation:—at any rate the captors will be entitled to their expences, as the licence

(a) The claim was in these words:—“The Claim *A. Rob. &c.* on behalf of himself, as *the importer and holder* of the bills of lading, for 140 bags, &c. laden on board the ship, being a neutral ship, under the authority of his Majesty’s licence, and on behalf of himself and others, the owners and proprietors, at the time the said ship was seized by, &c.—and for the said 140 bags of *Spanish* wool, as being laden on board a neutral ship, for the purpose of being imported into this kingdom, by the authority of the aforesaid licence, and by an order of his Majesty’s Most Honourable Privy Council, bearing date 20th *December* now last past, directed to be liberated, it having been made to appear to their Lordships’ satisfaction that his Majesty’s licence was granted for the importation thereof previous to the detention of the said ship, and for all costs, &c.—The affidavit of Mr. *Robarts* annexed to the claim, stated the circumstance of the licence, the capture, and order of restitution from the Privy Council, and concludes”—and this deponent lastly saith, that he is duly authorised to make the claim hereunto annexed, for the said goods on behalf of the owners and proprietors thereof; and that the *same is a just and true claim*, and that he shall be able to make due proof and specification thereof, as he verily believes. For the usual form of claim, see the appendix.

was

The
BEVERE VAN
KONINGSBERG

February 27th,
1800.

was not on board, consequently as they were under the necessity of bringing the case to adjudication. The enacting words of the act allowing the importation of *Spanish* wool are, ' That it shall be lawful for any person or persons to import into these kingdoms *Spanish* wool from any port or place whatever in foreign parts, and the Lords of the Council are to direct restoration to the respective owners or proprietors.'—It must be contended, to support a claim in the present form, that it was the intention of this act to extend the importation to all persons *whatever*, friends or *enemies*—a position that will hardly be maintained. The form of the release* reciting the act and the licence, proves also that it was intended only to protect the importation of *Spanish* wool being *British* property.

* See Appendix.

It recites, the act requiring the importation to be by licence, and directing the restoration to be to the *proprietor* or *proprietors*; it then states Mr. *Robarts* to have caused to be put on board these articles, for the purpose of importing under the authority of the licence; and declares the release to be under the powers and authority vested in the Lords of his Majesty's Council by the said act, referring clearly to that clause which directs them to restore to the respective *owners and proprietors*.

It appears also by the subsequent order of Council †, which may be taken as explanatory of the act, that there was no intention of extending it to other than *British* subjects.—This is an order of the 19th *February* 1800, which recites the act of parliament, 39 *Geo. III.* c. 98. and states, " Whereas doubts have arisen whether, according to the true construction of the said act, his *Majesty's* subjects are thereby authorised, &c." and

† See Appendix.

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and goes on to direct, "that it shall be lawful for any of *his Majesty's subjects* to purchase and import into this kingdom *Spanish wool*, notwithstanding the purchase and importation thereof may be deemed a trading with his Majesty's enemies; and notwithstanding the same might be liable to capture as the *property* of his Majesty's subjects trading with the enemy, in case the order had not been made."—Mr. *Robarts*, claims as "*importer and balder* of the bill of lading;" If, it is meant, that he *is the proprietor*, there can be no objection to restore to him what he claims in that character; but it is submitted, that this form of words is not sufficient, the obvious meaning of them in the licence, being only to extend the right of importing under it, from Mr. *Robarts* as the *original proprietor*, to any person to whom he might have indorsed the bills of lading, as a transfer of his original interest.

For the claim, *Arnold and Laurence*—It is not necessary to go so far as it has been attempted to push our argument on the other side; or to maintain, that the words of this licence would extend to authorise an *enemy merchant* to come before the Court, and claim this property as duly imported under such licence. It is sufficient to shew that there is nothing in the form of words, particularly confining the property to Mr. *Robarts*, or requiring him to claim under any specific description of property. The terms of the licence direct the *British* cruizers to permit *A. B.* or the bearer of his bill of lading to import." It empowers him to make the importation by any means, either by himself or his agents. The words of the explanatory order are in like manner as broad as possible, "*purchased, or caused to be brought into this kingdom,*"

kingdom," or "*cause to be imported*;" in conformity to these terms, it is submitted, that Mr. *Robarts* stands before the Court in the character marked out by the licence, as the importer and holder of the bills of lading, and that as such he is enabled to receive restitution, as it has been obtained before in other cases, under a similar form.

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Court.—The only point on which I shall decide at present is, that the captor must be entitled to his expences. Whoever has heard this case discussed, must see that the captors were obliged to bring it to adjudication. I am sorry that it should be attended with additional expence to the merchants, but if they entitle themselves to extraordinary privileges, they must know that they cannot enjoy the privileges of peace in time of war, without taking some disadvantages along with them. The difficulty arises on the terms of the licence: It is a very important question, and I shall not decide it without further deliberation.

On the 7th *March*, the *Court* said—Since the argument in this case, on the result of which I entertained no doubt in my own mind, I thought it not an unreasonable caution, on a matter so extensively connected with the commerce of the country, to inform myself, whether it was at all within the intention of his Majesty's Council in the grant of these licences, to permit the trade in the unlimited manner contended for by the claimants; and I find no such indulgence was intended to be given, or was deemed possible to be given under this act of parliament. I am therefore under the necessity of assigning Mr. *Robarts* to amend

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his claim, and certify that the goods are not the property of an enemy (a).

(a) The Editor has been informed, that upon an application afterwards made by the merchants, for a further extension of the trade with the enemy, and a full hearing thereon before the Council, it was deemed unadvisable to comply with the prayer of their petition.

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Report of the
Registrar and
merchants, dis-
allowing insur-
ance which had
not actually
been made,
affirmed.

THE HAABET, VETTE Master.

THIS was a case arising on an objection to a report of the registrar and merchants respecting the allowance of insurance. as part of the price of a cargo of wheat, going from *Altona* to *Cadiz*, but seized and brought into this country, and bought by Government. The demand of the claimant, Mr. *Peschie* of *Copenhagen*, had been disallowed in the report, on the ground that the insurance had not actually been made.

For the Petition, *Laurence and Swabey*—This is a case of a cargo of corn, purchased by Government, under a general agreement as to value, of allowing the invoice price, and ten *per cent.* profit; the insurance has been charged to this account, but the registrar and merchants have refused to admit it, because the insurance has not been actually made; that is, in effect, they have determined that owners are not at liberty to be their own insurers, by taking the risque on themselves. It will appear that this is an opinion by no means confirmed by the general opinion of the most respectable mercantile persons in this city: [a declaration of a contrary opinion was here offered to be introduced, signed by several merchants; and it was said that this had been offered, agreeably to prac-

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rice, to allow persons to state their case in writing, before the registrar and merchants at the time of forming their report. On objections to the admission of such evidence, it was rejected by the Court, with observations occurring the judgment.] *Counsel*—If the opinion of these most respectable merchants is not to be received as evidence, it will not be unfair to object, on our part against the competency of the merchants signing the report, to determine a question of this sort as judges. The authority which they may exercise in matters of freight and expences, in conjunction with the registrar, can give them no authority to speak as merchants on a point, in which it is submitted the greatest deference is due to the more general opinion of the mercantile world. It may be said perhaps, that there are some cases of costs and damages in which this charge has not been allowed, as between claimant and captor: but they will not be any authority for this case; this is a case between his Majesty's government and neutral nations on the right of purchasing goods *bordering* on the nature of contraband, and bound to ports of the enemy. It is a right, in its nature, of much delicacy, and one that has not been sanctioned by continued use; if it is a right which it is not thought adviseable to give up on the part of this Government, it must be allowed on all sides to be a right, which is to be exercised with great fairness, and respecting which the terms of payment are to be interpreted with the most liberal construction. The agreement is, that allowance shall be made for the original price, with a fair reasonable profit. At the beginning of this war, when the agreement was made, the same terms were adopted that had been settled in the last war; and all that was required was, that the neutral merchants

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merchants should prove that the premium charged was a fair one, in proportion to the ordinary sea risk, and that it had actually been charged in the invoice, previous to the capture, with a view to the general market price—it was not required that the policy of insurance should be produced. It was reasonably conceived, therefore, to be immaterial, whether the merchant insured with others, or whether, as large traders frequently do, he might chuse to stand his own insurer. This was the general understanding, and it is also warrantable to assert, that it was so understood, on the authority of the Navy Board, (which was then empowered to settle these matters;) and that it was not usual in the practice of the last war, to require the policy of insurance to be produced. That being the case, on what principle can it be said, that a merchant might not take the risk on himself? and that although no formal contract had taken place, he might not charge on his cargo the usual rate of insurance. It would be to prevent persons from conducting their own business in their own manner, and make a very good monopoly for public insurers. A paper has been invoked from the *Fortuna*, a case similar to the present, in which Mr. *Peschin* was the claimant of the cargo, and in which a general average had been incurred before capture—this has been disallowed also by the registrar and merchants in their report on that ship, and therefore it is a loss that he, standing as his own insurer, must bear himself. Supposing it to have happened in this very case, would it not be the most manifest hardship, to oblige him to stand to the loss of one part, and at the same time to prohibit him from making the charge of the premium of insurance? If the charge had not been made in the invoice,

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Invoice, there might have been some reason for resisting the payment, on the ground, that as every merchant must be supposed to take some means of indemnifying himself, he might be conceived to have included it generally under some other article. In this case, there was no invoice from the shipper, only a correct account. He could not know what the proprietor would do; but, on receiving his account, the proprietor sent off before the capture, a full and complete invoice, containing all charges, and among them insurance, and a fair interest for his money. It was said before the Registrar and merchants, that to allow insurance would be to grant insurance against *English* cruisers; but the rate of insurance in this case may be shewn to be at the rate of the sea risque only, and therefore that objection does not apply. It is apprehended, that in many respects the charge of insurance and freight stand on the same ground; as to freight, capture is considered as delivery, in such a manner as to entitle the neutral vessel to her freight. Suppose a cargo of this nature to belong to the owner of the ship, it could not be denied that he would be entitled to his freight; and not only on charges actually paid, for then it would be confined to the wages of seamen and other charges, but to the full extent of the fair profits of the voyage.—The demand of insurance is still stronger, for that is not a demand of profit, so much as of the price for risque, which the merchant had fairly taken on himself. On these grounds, and recurring to the practice of the last war, in which the officers of Government who settled these things, allowed this practice, without calling for the policy of insurance; and recollecting also that at the beginning

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of this war, the same understanding prevailed; it is submitted, that the Registrar and the merchants had no right to alter this practice, and say, *see* consider it otherwise; and, therefore, that their report ought not to be confirmed.

Against the demand the *King's Advocate*, and the *Advocate of the Admiralty*. — The question is, Whether the claimant is to be allowed to reckon amongst his charges and expences, a charge for insurance which he has never made? The report which is now before the Court has refused this demand; and notwithstanding the observations made on the report, it is apprehended, that the *prima facie* presumption will lie strongly in favor of those to whom the Court has referred the question; it being a board of a mixed nature, consisting of the Registrar, who is qualified to consider the law and practice of the Court, and of merchants selected by the Court, to give information on matters of mercantile use and custom. The opinion of such a Board will, therefore, stand in point of authority on very different grounds from the mere opinions of any private merchants, however respectable they may be. It is insinuated, that there has been an agreement in this matter; if so, it would be decisive; but that has not been shewn, and all that appears is, that the Navy Board in settling such accounts, in the last war, did not demand the policy to be produced; so in the beginning of this war also, before the Registrar and merchants; but this might proceed only on a supposition that the insurance had been paid; as when it is found charged in the invoice, the first impression would naturally be, that it has been paid. But immediately that it was discovered, that the insurance had not

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actually been paid, it was disallowed. That this case is to be more favourably considered on behalf of the claimant, than cases of costs and damages, where a wrong is supposed to have been committed against him by the captor, cannot reasonably be contended, for there the captor being adjudged guilty of a tort, would be liable to make the fullest compensation. But this is a case arising out of a justifiable act, out of the right of pre-emption, which has always been asserted, and is allowed to be justly exercised by all belligerent nations. It has, accordingly, been reduced to a matter of agreement, what the compensation shall be—an allowance of all payments, and a reasonable profit—all that this country is bound to do as to the price, is to *reinstale* the claimant, to *repay* the party what he has disbursed. How can this take place for sums, which have never been expended? The Court will not look to the state of profits, nor to the risk that may be calculated, at the port of delivery, neither will it compare this demand of insurance, which is optional, and depending on various circumstances, with the allowance of freight, which is in its nature a thing always attending the cargo. The risque of loss in this case has never been incurred. The payment has never been made, and therefore there is nothing on which the demand of the claimant can be sustained.

JUDGMENT.

Sir *Wm. Scott*.—This is a question on a report of the Registrar and merchants respecting an allowance of insurance on a cargo of corn, seized and brought into this country: The cargo was decreed to be restored, and the Registrar and merchants were directed

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to make a report on the value due to the claimant; such reports are in their nature partly legal and partly mercantile; it is a report proceeding from persons qualified in both these respects, to form a sound judgment on the subject before them; one of them being, from his connection with Courts of Justice, supposed capable of forming his own opinion, and of assisting his associates on all questions of law, in the first instance, subject to the inspection and correction of the Court, whilst the other part of this domestic forum, as I may call it, consists of persons acquainted with trade, and exercising their judgment on matters relative to commerce: It is from the report of a commission so constituted, that the question is now brought before the Court on a subject partly legal and partly mercantile. Another report has been brought before me to day from other persons, of whom it is impossible for me to speak with too much respect, attending either to the extent of their information, or to their known probity and honour; but they have, I think, a little mistaken their function in delivering their judgment upon the question proposed to them; they are persons of great experience in mercantile affairs, and from whom the Court, upon subjects purely of that kind, would gladly receive any information which they could conveniently impart. If the Court had desired to know, Whether it was the practice of merchants, in the ordinary course of commerce, usually to charge and allow insurance, though the insurance has never actually been made? their answer to such a question would have satisfied its conscience upon a matter of usage best known to themselves, and requiring nothing on

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on their part but a fair communication of their own experience and practice. But the question on which an opinion has here been obtained from them is this, "Whether if a neutral cargo is seized by a belligerent during war, the belligerent is in all cases bound in compensation for this cargo, (supposing it not liable to confiscation,) to pay such an insurance, no insurance having been paid by the shipper?" That is not a question merely of the law merchant, it is a question which may embrace other considerations, and those belonging to the general law of nations; in truth, it is the very question in the cause now submitted to my decision, and if I regard this opinion so given as an authority, there is an end of any duty which I have to perform, for here is an actual decision upon the whole law and fact of the present case. They will acquit me, I am sure, of any incivility, when I venture to say, that the labour of giving such a decision is not legally imposed upon *them*, and therefore that this private report so introduced, does not come with any just credentials of authority.

The question is, Whether there is any reasonable ground for me to pronounce that the Registrar and merchants have disallowed a just demand, in disallowing a charge of insurance which had not been made. It has been argued that this charge ought to have been allowed, because it is usually so allowed in the dealings of merchants with each other; I am not clear that this is a necessary consequence, for it is surely no certain rule that in *all cases* where a cargo is taken *jure belli* but for the mere purpose of pre-emption, that it is to receive a price calculated exactly in the same manner, and amounting precisely to the

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same value, as it would have done, if it had arrived at its port of destination in the ordinary course of trade.

The right of taking possession of cargoes of this description, *Commeatus* or *Provisions*, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of *Europe*, or at least of several maritime states of *Europe*, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation, to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that on the side of the neutral, the same exact compensation is to be expected, which he might have demanded from the enemy in his own port; the enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established, that such a purchase shall be regulated exactly upon the same terms of profit, which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable indemnification and

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and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expences which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on the same terms, on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but authorised exercises of the rights of war.

Two or three considerations have been urged, which may, with all propriety, be dismissed; one is, that it was understood between the King's government and the parties that this charge should be allowed: Certainly if it were made out by any credible proof, that the faith of government had been in the slightest manner pledged to such an understanding, there is no principle which this Court would hold more sacred, than that the faith of government should be held inviolate in transactions of this kind; but no sort of proof is offered of this, and the fact has in no way come to my knowledge. It is said likewise, that in the cases of this kind which occurred last war, and which were then settled by the Navy Board, the charge of insurance was allowed, but the policy of insurance was never called for. How this practice came to prevail there, whether under a notion that the insurances had been really made whenever they were charged, whether under any order of government, or how otherwise, I am

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not informed; the persons who had to settle those accounts were not mercantile men, and might be led by the charge to suppose, that it had actually been incurred: Under whatever circumstances such a practice grew up, if it did obtain, it is no binding rule upon the Registrar and merchants here, it might be simple mistake, and at best it is no deciding authority.

I have already said, that the expected payment at the port of delivery, is not the necessary measure of compensation at the port of the belligerent. It is not so with reference to any constituent of price; with respect to insurance, considered as such, it would be peculiarly improper; it is reasonably to be charged at the port of delivery, although it has never been paid, because the merchant has stood his own risk, and has purchased the insurance at the expence of his own danger. But is that the case where the voyage has been interrupted almost in its commencement, where the cargo has been carried into a neighbouring port? In the present case the voyage was from *Altona* to *Cadiz*, from the north to the south of *Europe*, and the cargo is seized upon its entrance into the *British* Channel very soon after quitting its port. Most of the cargoes taken have a similar destination, and are taken under similar circumstances: What pretence is there to say that all risks of the voyage have been incurred? The utmost that could be claimed is an insurance *pro rata itineris peracti*, amounting to a very small proportion of the whole, hardly deserving a particular consideration. As to what is said, that in the case of capture of ships, you allow the full freight of the whole

whole voyage; that allowance is made on another account; you take the ship in that case on account, not of itself, but of its cargo; you interrupt its occupation which was legal and innocent, and it is therefore not unjust to allow it the benefit of its original contract, which you alone have prevented from being carried into execution. Very different is the consideration of risk, respecting a cargo, which has never been incurred, and of a payment which is due only, on the event of that risk having been actually incurred—no contract subsisting, and the cargo being, in its own nature, liable to this species of interception.

Upon the whole, I see no sufficient reason to pronounce that the Registrar and merchants have adopted a wrong measure of value in disallowing the charge of insurance; they have allowed what, upon their own experience, they pronounce to be a reasonable indemnification and profit, and I do not understand that the sufficiency of this indemnification and profit is impeached, on any other ground, than that an insurance would have been added in the ordinary course of a mercantile account, if the cargo had reached its intended destination. Being of opinion that the ordinary terms of a mercantile account, to be settled on the completion of the voyage, do not furnish, (all circumstances being duly weighed,) the necessary or just measure of value, to be applied in transactions of this kind, I do not find myself enabled to sustain the objection. If, as it has been repeatedly urged, an understanding to a different effect has subsisted between the King's government and the parties, there can be no doubt that on their resort to a superior tribunal, better acquainted with
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Principle of war
1756. Relax-
ations not to be
extended by
construction.
Voyage from a
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illegal.

any communications that may have passed upon the subject, they will have the full benefit of any such engagement. Report confirmed.

THE IMMANUEL, EYSENBERG Master.

THIS was the case of an asserted *Hamburg* ship, taken 14th *August* 1799 on a voyage from *Hamburg* to *St. Domingo*, having in her voyage touched at *Bordeaux*, where she sold part of the goods brought from *Hamburg*, and took a quantity of iron stores and other articles for *St. Domingo*. A question was first raised as to the property of the ship and cargo; and 2dly, supposing it to be neutral property, Whether a trade from the mother country of *France* to *St. Domingo*, a *French* colony, was not an illegal trade, and such as would render the property of neutrals engaged in it liable to be considered as the property of enemies, and subject to confiscation? It was denied that *St. Domingo* was to be considered in its present state as a *French* colony. After various observations on these points, farther proof was directed to be made of the property; and permission was given, to both parties, to produce information as to the state and condition of *St. Domingo* at that time.

On the 5th of *August* 1800 the cause was heard on farther proof.

For the captors, *King's Advocate* and *Laurence*.— The proofs of property that have been brought forward, seem not to be exposed to much objection, and therefore allowing it to be neutral property, the question remains only as to the effect of the trade in which

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which it has been engaged.—Whether *St. Domingo* is not to be taken as a *French* colony?—And taking it so to be.—Whether property so engaged in trade between the mother country and her colony, is not, under the established principles of this country, subject to condemnation? That *St. Domingo* is to be considered as a *French* colony, sufficiently appears from a variety of circumstances, some of them arising in this very cause: Besides the general professions of *Toussaint*, and the continual communications that are passing between that colony and *France*; we find in this cause an exemption of duties, in respect to the importation of its produce into *France*, and a general understanding on the part of Mr. *Jennish's* correspondent at *Bordeaux*, that the *French* laws were still in force there. Considering besides, that no proof which the Court can receive, has been produced on the other side, the fact may be assumed without farther argument, that *St. Domingo* was a *French* colony, and that sufficient ground is laid, for the operation of the principle of law, which has always been applied to such cases. As to the general principle of law, it has so often been a *vexata questio* in this Court, that it will not be necessary to go at length into all the details of history and reasoning, by which it is supported. It will be sufficient to advert to the principles of the war of 1756, when this matter was fully settled, on principles that have never yet been abandoned, notwithstanding that they may have undergone temporary relaxations;—as in the last war, owing to the fallacious professions of the *French* government, as to the changes of their colonial system. It is notorious, that these professions proved untrue; the former

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former principle was re-established, and has ever since been taken to be in full force, as far as it is not relaxed by the Orders of Council that have issued this war.

The first orders of 1793 contained no relaxation whatever. In *January* 1794 fresh instructions issued, directing the bringing in of *West India* produce coming to *Europe*, being a relaxation as to the intercourse of *America* with the *West India* markets; a change thought reasonable from the particular situation of that country, and the treaties that had been made with it; but not operating as any abandonment of the general principle, as it respected the colonial system of *Europe*. Afterwards a farther relaxation took place, 25th *January* 1798, as to the allowance of bringing the produce of the *West India* islands to *Europe*, but only to the ports of this country, or to some port of the country to which the neutral merchant belonged: This is the extent of the relaxations that have passed; they have not gone so far as to authorise a commerce between the colony and the mother country; and by parity of reasoning there can be no pretence to say, there has been any relaxation, as to the outward trade, from the mother country of the belligerent to the colony. In point of principle there can be no distinction made. There is the same support and maintenance of their revenues by payment of duties, the same employment of the experience and industry of *French* merchants in assorting the cargo, and the same return of profits to them. On the contrary, the injury to the other belligerent is in some respects greater, as it furnishes a supply of war stores, as appears by many of the articles of this cargo, hemp, flax, iron, bricks. It is, besides, a general consequence of these outward speculations;

speculations; that they bring a return of importation of colonial produce into *France*; as it appears in this case that many neutral ships had gone from *Bourdeaux* to *St. Domingo*, which had found their way back to *Bourdeaux*, although the return of this particular vessel is represented to have been destined for *Hamburg*.—On these grounds it is submitted, that this is an illegal trade subjecting the property engaged in it to condemnation.

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For the claimant, *Arnold and Sewell*.—The particulars of this case are, that it was a speculation beginning at *Hamburg* to send certain goods to the market of *St. Domingo*, with a liberty of touching at *Bourdeaux*, where some of the goods were to be landed and others taken in for *St. Domingo*: In the original scheme of the voyage the bricks and iron pots were to have been carried on to *St. Domingo*; but it being found at *Bourdeaux*, that some difficulties were likely to arise at the Custom-house, on clearing out such articles, and as it was apprehended that similar difficulties might arise at *St. Domingo*, they were landed at *Bourdeaux*, to be sent back to *Hamburg*, and other articles of the same kind, but about which, the same difficulties were not likely to arise, were put on board. The hemp, about which some argument was at first attempted to be raised, was not on board at the time of capture, and therefore it is conceived that may be laid out of the case. The principal question arises on the legality of going on a voyage of this description, from a port of *France* to a *French* colony: In respect to the state of *St. Domingo*, it cannot be denied, that the representations of the state of the island were numerous and opposite, clearly shewing that

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that the island was at least in a very unsettled state, and affording a just cause of impression on the mind of Mr. *Jennish*, to suppose it was no longer a *French* colony; there is at least a fair ground for the inducement, under which Mr. *Jennish* states himself to have acted, in engaging in this trade, principally, owing to the unsettled state of the island. It being shewn that there was sufficient to justify this impression on the part of Mr. *Jennish*; it may be better to address the argument to the general question, allowing, for argument's sake, that *St. Domingo* was at this time a *French* colony. It is true that the general colonial law of *Europe* has created a monopoly, from which other countries are generally precluded; at the same time laws respecting colonies, and laws respecting trade in general, have always undergone some change and relaxation after the breaking out of hostilities; it is necessary that it should be so, with regard to the rights of neutral nations; because as war cannot be carried on between the principal powers of *Europe*, in such a manner as to confine the effects of it to themselves alone—it follows that there must be some changes and variation in the trade of *Europe*; and it cannot be said that neutrals may not take the benefit of any advantages that may offer from these changes—because, if so, it would lead to a total destruction of neutral trade; if they were to suffer the obstructions in their old trade, which war always brings with it, and were not permitted to engage in new channels, it would amount to a total extinction of neutral commerce: Such a position, therefore, cannot be maintained, that they may not avail themselves of what is beneficial in these changes, in lieu of what they must necessarily

necessarily suffer, in other parts of their trade, in time of war. It is not meant that they should be entirely set at liberty from all the restrictions of peace,—that would be going too far: But that, as there has been a regular course of relaxations, as well in our navigation laws, as in the colonial trade, in admitting importations and exportations not allowed in time of peace, it seems not to be too much to say, that if they have been regularly relaxed in former wars, neutral merchants may think themselves at liberty, to engage in it, in any ensuing war, with impunity;—and it does justify a presumption, that, as a belligerent country allows a change in its own system as necessary, and invites neutrals to trade in its colonies under relaxations, so it would allow them to trade in the same manner, with the colonies of the enemy. It may be said that the strict principle of war is, to do all possible mischief to your enemy, and destroy his resources and trade, as much as you can—this may be true in theory, but it must be understood only, as the strict theoretic principle, which, in practice, is limited by other considerations, and by rights of other parties; the whole trade of the enemy cannot be destroyed without the greatest injury to neutral nations, therefore this right against the enemy must be limited, in some degree, by the rights of neutral trade. If you can find indeed a trade wholly and exclusively confined to the enemy, that is the point on which it is lawful for you to strike; that was the rule and the foundation of the principles set up in 1756; the state of the colonies at that time justified it—the system remained entire—and as long as the colonial trade remained an exclusive trade, that was the point, on which it was lawful to strike; but

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but, since that time relaxations have been regularly admitted; at the commencement of the last war it was so allowed to be, and on that account the same principle was not enforced; the principle might not be abandoned, but the fact being, that the *French* had opened their ports, the principle was not applied: In the same manner the *French* have opened their ports in this war, and various relaxations have been admitted; it is now held to be an allowable trade from a neutral country to the colony of a belligerent. The war commenced with a general prohibition in the instructions of *November 1793*, and all vessels were directed to be taken that were carrying supplies to the colonies of the enemy, or bringing produce from them; but these were relaxed in *January 1794*, and other instructions issued of narrower extent. It was then directed to bring in those vessels that were carrying *West India* produce from the *West India* islands to *Europe*, and those that appeared to be going to such islands in the *West Indies* as were under blockade. This seems to be the only restriction on trade to the *West India* islands, that it should not be going to islands under blockade; this order continued in force four years, till the restriction was still farther taken off, by allowing neutral vessels to carry *West India* produce to *Europe*, either to our ports or to the ports of their own country. It is not asserted that the whole of the colonial trade is laid open by these relaxations, or that a neutral ship might go from a port of *France* to a colony and back again to *France*—making one whole and entire transaction; in that case the returns would be projected before the voyage began; and that, it must be allowed, would

would be only the trade of the enemy on increased freight. But as to separate voyages the matter is very different—as well in regard, to the nature and effect of the trade itself, as to the terms of the instructions respecting it:—the legality of the trade homeward from the colony to *France*, is a question at present suspended before the Lords; and such a trade might be construed to fall within the scope of the King's instructions, although it is not so affirmatively expressed; but this trade outward to the colony cannot, by any implication, come within the terms of the instruction. It remains then, only to enquire, Whether there is any thing in the nature of it, that should induce the Court to consider it as illegal? It cannot be illegal on the ground that it is not legal for the neutral to go to the colony of the enemy, because he is now allowed to go from his own port; therefore the same supplies may be afforded. It cannot be, that he assists the enemy by taking articles from the mother country; that he might do circuitously, by going to his own country first, with equal advantage to the mother country, in respect to its revenue arising from duties. On these grounds it cannot be illegal; neither is it made so by notification, or in the King's instructions to his cruizers. With respect to authorities, it cannot be expected that there should be any. The question has not arisen in this war; or it would not be to be discussed so much at length in the present case. During the last war there could not arise any precedent, as there was then a general relaxation. But there is a case, of the *Vernagling* in 1786, where freight was given to a neutral ship going from *Marseilles* to a *French* colony and back; from which it appears that, whilst neutrals were admitted generally to partake in

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the colonial trade, it was not thought to afford any ground of distinction that they were going from a *French* port.

JUDGMENT.

Sir *Wm. Scott*.—This is the case of a ship taken on a voyage originally from *Hamburg*, first to *Bordeaux*, where she discharged part of her cargo, and having taken on board other goods, proceeded to the colony of *St. Domingo*, and was taken in this period of the voyage. The first point made on the part of the claimants is, that *St. Domingo* is not to be considered as a *French* colony, but as in a state of independence; and a second point made is, that even if it were considered as *French*, yet, as the *English* have themselves traded with that island, this must be deemed a permission to the subjects of neutral countries to do the like. In proof of the former allegation an attempt was made to introduce extracts from the common *English* newspapers, which the Court would not permit to be read; the *Gazette* is the only authority of this species admitted and respected by the Court for reasons too obvious to require a particular notice. From other more legitimate evidence, than any contained in unauthorised publications of that nature, I think it is legally to be held, that *St. Domingo* continues a *French* colony. It appears that a direct commercial correspondence, and communication, is carried on between *France* and that island, which could hardly be if it was deemed to be in a state of revolt and disruption from the mother country; the *French* Custom-house ordinances and regulations appear all to be in full force there; ships go certificated and bonded as upon the former system; and if there are parts

parts of the island not under *French* dominion, it does not at all appear that it was in the view of the present parties to trade with those parts exclusively.

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Upon the second preliminary point, *viz.* That an *English* trading with this *French* colony, must, at all events, be deemed an authorisation of the same trade to the subjects of other countries, I have only to observe, that it might be admitted to have that effect, if the fact were true in the degree necessary to support the conclusion. The matter of illegality imputed to the present claimants is a direct trading between the mother country of the enemy and his colony, a lending of themselves to the purpose of a direct communication between the two. To shew that *Englishmen* have traded to *St. Domingo*, and under the authority of their government, is not shewing enough, unless it is likewise shewn, that they had, under that authority lent themselves to be the instruments of a direct commercial correspondence between *France* and its colony; a trading between the dominions of *Great Britain* and *St. Domingo*, could authorise no more than a trading between the neutral country itself and that colony.

On the other hand it has been pressed against the claimants, that some part of the cargo which came from *Hamburg* and was discharged at *Bordeaux* was contraband, and being the property of the same persons would affect the goods, which travelled with them from *Hamburg*, and were proceeding onwards to their ultimate destination of *St. Domingo*. The goods which are charged to be of the nature of contraband, are hemp, or some similar substance, under another name fit for the manufacture of ropes. As

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these commodities are not now remaining on board the ship, they cannot become the subjects of any inspection, which the Court could order for the purpose of ascertaining their real nature and probable use. It is argued indeed, that the claimants' agents at *Bordeaux* speak, in a letter, of their expectation that the rope-makers employed by the government at that place would purchase them. But it does not appear that these persons had themselves seen the articles, or that they had any thing more than a general hope that the goods might find a vent of that kind. On the other hand it appears that these goods had been inspected by a *British* man of war at *Dover*, when the ship put in there in the course of her voyage to *Bordeaux*; there is reason to presume that the search was not made in a perfunctory manner; it was made in a harbour where a search could be conveniently made, and by persons generally sincere enough in their desire to make such searches effectual. The inference is, that they were not of a contraband nature; at best it is left ambiguous, and without any particular means remaining of affording a certainty upon the matter. If so, it is useless to enquire what the effect of contraband in such circumstances would have been. I shall say no more, than that I incline to think that the discharge of the goods at *Bordeaux* would have extinguished their powers of infection. It would be an extension of this rule of infection not justified by any former application of it to say, that after the contraband was actually withdrawn, a mortal taint stuck to the goods with which it had once travelled, and rendered them liable to confiscation even after the contraband itself was out of its reach.

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Another consideration was likewise pressed against these goods; that having been entered at *Bordeaux*, and exported from thence, it must be deemed an actual exportation from that port, and consequently that they are liable to be treated legally in the same manner (whatever that manner may be) as the goods first put on board at *Bordeaux*. I incline to think that this would be much too rigorous an application of principles rather belonging to the revenue law of this kingdom, a system of law having little in common with the general prize law of nations; and that these goods are entitled to be considered as coming from *Hamburg*, the original place of their shipment; and former decisions having fully established that a direct commerce from a neutral country to a *French* settlement was open, I decree restitution of these goods, which all appear to be neutral property.

Upon the mere question of property, as it respects all the goods as well as the ship, I see no reason to entertain a legal doubt. Considering them as neutral property, I shall proceed to the principal question in the case, *viz.* Whether neutral property engaged in a direct traffic between the enemy and his colonies, is to be considered by this Court as liable to confiscation? And first with respect to the goods.

Upon the breaking out of a war, it is the right of neutrals to carry on their *accustomed trade*, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case however they are entitled to freight and expences.

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I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the expence of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking.

What is the colonial trade *generally speaking*? It is a trade generally shut up to the exclusive use of the mother country, to which the colony belongs, and this to a double use;—that, of supplying a market for the consumption of native commodities, and the other of furnishing to the mother country the peculiar commodities of the colonial regions; to these two purposes of the mother country, the general policy respecting colonies belonging to the states of *Europe*,
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has restricted them. With respect to other countries, generally speaking, the colony has no existence; it is possible that indirectly and remotely such colonies may affect the commerce of other countries. The manufactures of *Germany* may find their way into *Jamaica* or *Guadaloupe*, and the sugar of *Jamaica* or *Guadaloupe* into the interior parts of *Germany*, but as to any direct communication or advantage resulting therefrom, *Guadaloupe* and *Jamaica* are no more to *Germany* than if they were settlements in the mountains of the moon; to commercial purposes they are not in the same planet. If they were annihilated it would make no chasm in the commercial map of *Hamburg*. If *Guadaloupe* could be sunk in the sea by the effect of hostility at the beginning of a war, it would be a mighty loss to *France*, as *Jamaica* would be to *England*, if it could be made the subject of a similar act of violence. But such events would find their way into the chronicles of other countries, as events of disinterested curiosity, and nothing more.

Upon the interruption of a war, What are the rights of belligerents and neutrals respectively regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: Such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended they must fall to the belligerent of course—and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution?

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tion? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent; and to say, "True it is, you have, by force of arms forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening, which the prevalence of your arms alone has affected; supplies shall be sent and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others."

Upon these grounds, it cannot be contended to be a *right* of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of *French* councils, but of *British* force.

Upon these and other grounds, which I shall not at present enumerate, an instruction issued at an early period

period for the purpose of preventing the communication of neutrals with the colonies of the enemy, intended, I presume, to be carried into effect on the same footing, on which the prohibition had been legally enforced in the war of 1756; a period when Mr. Justice *Blackstone* observes, the decisions on the law of nations proceeding from the Court of Appeals, were known and revered by every state in *Europe*.

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Upon further inquiry it turned out that one favoured nation, the *Americans*, had in times of peace been permitted, by special convention, to exercise a certain very limited commerce with those colonies of the *French*, and it consisted with justice that that case should be specially provided for; but no justice required that the provision should extend beyond the necessities of that case; whatever goes beyond, is not given to the demands of strict justice, but is matter of relaxation and concession.

Different degrees of relaxation have been expressed in different instructions issued at various times during the existence of the war. It is admitted that no such relaxation has gone the length of authorising a direct commerce of neutrals, between the mother country of the enemy and its colonies; because such a commerce could not be admitted without a total surrender of the principle; for allow such a commerce to neutrals, and the mother country of the enemy recovers, with some increase of expence, the direct market of the colonies, and the direct influx of their productions; it enjoys as before, the duties of import and export, the same facilities of sale and supply, and the mass of public inconvenience is very slightly diminished. Even supposing that this trade is carried

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on with integrity, (which it is difficult to hope under all the temptations and opportunities of fraud which a direct intercourse will supply,) there is every reason to believe that the ancient monopoly will, in effect, revive itself without the aid of exclusive prohibitions. The force of long established connection, and of antient habits of trade, would in a great measure preserve for a time to the mother country, its antient exclusive commerce with colonies, although the communication might be legally open to the merchants of other countries.

Much argument has been employed on grounds of commercial analogy—*this trade* is allowed—*that trade* is not more injurious—*Why not that* to be considered *as equally permitted*? The obvious answer is, that the true rule to this Court is, the text of the instructions; what is not found therein permitted, is understood to be prohibited, upon this plain principle, that the colony trade is generally prohibited, and that whatever is not specially relaxed continues in a state of interdiction. The utmost that could be contended would be, that a commerce exactly *ejusdem generis & gradus* would be entitled to the favour of the permission; but the relaxation is not to be extended by construction, particularly where authority has been gradual in its relaxation;—where It has distinguished, and stopped short in several stages, individuals have no right to go further, upon a private speculation of their own, that authority might as well have gone further. It is argued that the neutral can import the manufactures of *France* to his own country and from thence directly to the *French* colony; Why not *immediately* from *France*, since the same purpose is

is effected? It is to be answered, that it is effected in a manner more consistent with the general rights of neutrals, and less subservient to the special convenience of the enemy. If a *Hamburg* merchant imports the manufacture of *France* into his own country, (which he will rarely do if he has like manufactures of his own, but which in all cases he has an uncontrollable right to do,) and exports them afterwards to the *French* colony, which he does not in their original *French* character, but as goods which, by importation, had become a part of the national stock of his own neutral country, they come to that colony with all the inconvenience of aggravated delay and expence; so if he imports from the colony to *Hamburg*, and afterwards to *France*, the commodities of the colony, they come to the mother country under a proportionable disadvantage; in short the rule presses upon the supply at both extremities, and therefore if any considerations of advantage may influence the judgment of a belligerent country in the enforcement of the right, which upon principle it possesses, to interfere with its enemy's colonial trade, it is in that shape of this trade, that considerations of this nature have their chief and most effective operation.

It is an argument rather of a more legal nature than any derived from these general topics of commercial policy, that variations are made in the commercial systems of every country *in wars and on account of wars*, by means of which neutrals are admitted and invited into different kinds of trade, for which they stand usually excluded, and if so, no one belligerent country has a right to interfere with neutrals for acting under variations of a like kind

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made for similar reasons in the commercial policy of its enemy. And certainly if this proposition could be maintained without any limitation, that wherever any variation whatever is made during a war and on account of the state of war, the party who makes it binds himself in all the variations to which the necessities of the enemy can compel him, the whole colony trade of the enemy is legalised; and the instructions which are directed against any part are equally unjust and impertinent; for it is not denied that some such variations may be found in the commercial policy of this country itself; although some that have been cited are not exactly of that nature. The opening of free ports is not necessarily a measure arising from the demands of war, it is frequently a peace measure in the colonial system of every country; there are others which more directly arise out of the necessities of war;—the admission of foreigners into the merchant service as well as into the military service of this country;—the permission given to vessels to import commodities not the growth, produce, and manufacture of the country to which they belong, and other relaxations of the act of navigation and other regulations founded thereon: These it is true take place in war, and arise out of a state of war, but then they do not arise out of the predominance of the enemy's force, or out of any necessity resulting therefrom, and that I take to be the true foundation of the principle. It is not every convenience or even every necessity arising out of a state of war, but that necessity which arises out of the impossibility of otherwise providing against the urgency of distress inflicted by the hand of a superior enemy, that can be admitted to produce such an effect. Thus in time of war
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every country admits foreigners into its general service—every country obtains, by the means of neutral vessels, those products of the enemy's country which it cannot possibly receive, either by means of *his* navigation or its own. These are ordinary measures to which every country has resort in every war, whether prosperous or adverse: They arise, it is true, out of a state of war, but are totally independent of its events, and have therefore no common origin with these compelled relaxations of the colonial monopoly; these are acts of distress, signals of defeat and depression, they are no better than partial surrenders to the force of the enemy, for the mere purpose of preventing a total dispossession. I omit other observations which have been urged and have their force, it is sufficient that the variations alluded to, stand upon grounds of a most distinguishable nature.

Upon the whole view of the case as it concerns the goods shipped at *Bordeaux*, I am of opinion that they are liable to confiscation. I do not know that any decision has yet been pronounced upon this subject; but till I am better instructed by the judgment of a superior tribunal, I shall continue to hold that I am not authorised, either by general legal principles applying to this commerce, or by the letter of the King's instructions, to restore goods, although neutral property, passing in direct voyages between the mother country of the enemy and its colonies. I see no favourable distinction between an outward voyage and a return voyage.—I consider the intent of the instruction to apply equally to both communications, though the return voyage is the only one specifically mentioned.

The only remaining question respects the ship; it belongs to the same proprietors, and if the goods could

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could be considered as properly contraband, would on that account be liable to confiscation, for in the case of clear contraband this is the clear rule: I incline to apply a more favourable one in the present case. It is a case in which a neutral might more easily misapprehend the extent of his own rights, it is a case of less simplicity, and in which he acted without the notice of former decisions upon the subject. The ship came from *Hamburg* in the commencement of the voyage, she was not picked up for this particular occasion, but was intended to be employed in her owner's general commerce. Attending to these considerations, I shall go no further than to pronounce for a forfeiture of freight and expences, with a restitution of the vessel.

Cargo, taken in at *Bourdeaux*, condemned; ship restored, without freight.

On the same day, in the case of the Rose, Young master,

Which was a case of an *American* ship going from *Amsterdam* to *Guadaloupe*, with an assorted cargo—claimed on behalf of *American* merchants:

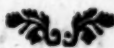
The Court.—With respect to this case it differs only from the last, in this circumstance, that it is the case of a voyage from one enemy to the colony of another enemy allied in the war.—I am of opinion, that this does not form a solid distinction: On the principles which I have laid down, I think it would be impossible to maintain the rule of law without applying it also in this extent.

Sentence the same.

THE END OF THE FIRST PART.

ERRATA.

- Page 22. line 11. before meaning *insert* literal
23. — 2. *for* under *read* with
31. — 15. *after* chace *insert* at any period of it
42. — 8. *dele* whole
135. — 25. *for* whilst there was neither war nor
prospect of war *read* without any attention
to the event of a war
163. — 26. *for* or *read* and
180. — 17. after persons *insert* private merchants





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R E P O R T S
OF
C A S E S
DETERMINED IN THE
HIGH COURT OF ADMIRALTY,
&c. &c. &c.

THE CHRISTOPHER, SLYBOOM Master.

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THIS was a case of a *British* prize-ship taken by the *French*, and carried into the *Spanish* port of *St. Sebastian*; from whence the ship's papers were transmitted to *France*, and a sentence of condemnation passed at *Bayonne*, May 9th, the ship still lying in the *Spanish* port. The ship was then sold to the present claimant, a merchant of *Altona*; and was sailing at the time of capture, July 1799, in ballast from *St. Sebastian* to *Altona*.

Condemnation in France of a *British* ship, taken by a *French* privateer into a *Spanish* port, and lying there at the time of condemnation, held valid.

On the part of the captors—It was contended under the authority of the *Fladoyen*, that this was a purchase resting on an illegal sentence of condemnation; and therefore that it could not avail, to transfer any right or just title to the neutral claimant.

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JUDGMENT.

Sir *W. Scott*—This is a case materially differing from those in which condemnation has passed on ships carried into a neutral country; those proceedings have been held illegal, principally, because it was not to

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be presumed that a neutral government would so far depart from the duties of neutrality as to permit the exercise of that last, and crowning act of hostility, if I may so express myself, the condemnation of the property of one belligerent to the other; thereby confirming and securing him in the acquisition of his enemy's property by hostile means.—But this will not hold good with respect to condemnations passed on ships brought into the ports of an ally in the war. In such cases there is nothing to prevent the government from proceeding to that last act of hostility; there is a common interest between them on the subject; and both governments may be presumed to authorize any measures conducing to give effect to their arms; and to consider each others ports as mutually subservient. I am, therefore, inclined to hold such a condemnation sufficient, in regard to property taken in the course of the operations of a common war.

As the facts of purchase appear to be sufficiently proved on the farther proof that has been exhibited, I shall decree restitution of this ship for the claimants.
Ship restored.

In the *Harmony, Ellrecht*, Nov. 18th, 1799, which was a case of a *British* prize ship taken by a *French* privateer, and carried to *Helvetfluy*s, and condemned by the *French Commissary of Marine*, at *Rotterdam*, 6 *Prair. an 6*, 25 *May* 1798; and in the case of the *Adelaide, Pietrom*, under circumstances exactly similar; further proof being required to be given of the property, and of the *bonâ fide* transfer to the neutral claimant, the question of law respecting the legality of such condemnations was expressly reserved.

In the *Beisy, Kruger*, 12 *August* 1800, which was a case under circumstances exactly similar, the question of law was waived; and the legality of the condemnation being admitted by the Court, further proof was directed to be made of the fact of transfer.

THE GERTRUYDA, DE VRIES Master.

Nov. 19th,
1799.

THIS was a case on the admission of an allegation on the part of the Admiralty, claiming to have the *Dutch* ships taken by Lord Keith at the Cape of Good Hope, condemned as *droits* of Admiralty; as being taken in port subsequent to the declaration of hostilities against Holland.

Dutch ships detained in port, at the Cape of Good Hope, before declaration of hostilities against Holland, claimed as *droits* of Admiralty: condemned to the Crown, *jure coronæ*.

Against the admission of the allegation, the King's Advocate and Arnold—The question before the Court arises on a capture made in the year 1795, and it is undoubtedly to be lamented on all sides, that distribution should have been long prevented by any conflicting claims, as to the manner in which it shall be condemned: It now comes forward on an opposition to the allegation; that, if the Court should think there is no ground to sustain the demand set up on the part of the Admiralty, all farther delay may be removed. The question is, Whether certain ships taken by *Ld. Keith*, at the Cape of Good Hope, and detained by him there previous to the act of capture, shall be condemned to the King *jure coronæ*, or as *droits* of Admiralty. The distinction of law on this point, it is apprehended, has been long clearly established, "that all vessels detained in port, and found there at the breaking out of hostilities, are condemned *jure coronæ* to the King; and that all coming in after hostilities, not voluntarily by revolt, but ignorant of the fact, are to be condemned as *droits* of Admiralty."—The only doubt that can be made

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in the present question, is to determine, under which of these descriptions these ships are, under all the circumstances preceding and attending the capture, to be considered: the circumstances are briefly these: on the 11th of *June* 1795 Lord *Keith* sailed into *Symond's Bay*, and found several *Dutch* ships lying there: a *Dutch* packet was allowed to sail, and also a *Dutch* frigate, the *Midenbleck*, on the 21st *June*, but the ships in question and several other merchant ships lying there, were not permitted to depart.

Lord *Keith* wrote to the commanders of the *Dutch* ships on the 28th *June* stating, "that from some unfriendly appearances in the Governor and Council at the *Cape*, he was apprehensive of a design to deliver the colony at the *Cape* to the *French* faction, that had over-run the mother country; and that he was commissioned by the King of *Great Britain*, in conjunction with the Stadtholder, to prevent such a measure, and accordingly laid his commands on them not to move from that place."

It is impossible to contend, therefore, that there was not a detention and embargo and restraint of prizes, in this case; or that the property subsequently taken as prize, in consequence of such detention, is to be distinguished in any way from property taken under similar circumstances in *Europe*: on the 9th of *July* a farther communication was made by Lord *Keith*, "that it would be necessary for him to put some of his men on board to prevent any waste or damage of the cargo of the ships, or any mischievous intention that might be formed of setting fire to them; but that the vessels were not to be

be considered as seized."—It is on this expression, perhaps, that the claim of the Admiralty is now set up: but whatever might be the terms of the intercourse, it is impossible to say, these ships were not precisely under the very same circumstances, in point of fact, as all other *Dutch* property detained in the ports of this kingdom.

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All this passed previous to the declaration of hostilities against *Holland*, which did not issue, till the 15th of *September* 1795; on the 18th Captain *Hardy* took possession of one of the *Dutch* ships, the *Williamstadt en Boetslaar*, for his Majesty's service, under a commission granted to him on the 12th of that month by Lord *Keith*: this was all that happened previous to the knowledge of the declaration of hostilities against *Holland*; these ships remained in the same state till the month of *May* 1796, when the intelligence of hostilities was received at the *Cape*, and immediately the *Dutch* flags were struck, and the ships taken possession of as prize. A similar question has already been determined in the case of the *Overyffel*, which was a *Dutch* ship of war, detained in an *Irish* port in the month of *March* 1795, and carried into the *Cove of Cork* for security: till, after the declaration of hostilities, the colours were struck *October* 1795, and the ship has since been condemned as prize to the Crown. The detention which has happened, as well in that case as in the present, is all that can in any case take place; it is not necessary, that an actual seizure shall be made, in the form of prize; because before the proclamation issues, that cannot be; an embargo, or the forcible detaining of such vessels,

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is all that can in the first instance be put in force. It has taken place in this instance; and it is submitted that these ships stand in the same situation and must follow the same course, as all the other *Dutch* property, detained in the ports of this kingdom, before the actual declaration of hostilities, and since condemned *jure coronæ*, to the King.

For the allegation, the Advocate of the Admiralty and Laurence—If in the ports of this kingdom, an order of Council puts a general embargo on the ships of any foreign state, and reprisals afterwards take place, it is not contended that such vessels would not be condemnable as prize to the King *jure coronæ*: the *Overyffel* was a case of that description; and no question was raised about it; it passed, in a manner *sub silentio*, as a matter of common condemnation, and no observation was made upon it, but many material distinctions seem to render that case no authority on the present question. That ship was detained, on an embargo laid on the ports of this kingdom, and operating therefore with just force and authority to produce its effect: but no embargo issuing in this country can operate with any effect, beyond the limits of his Majesty's realms; it is a mere nullity as to other countries; and no instance can be produced of an attempt to lay an embargo on the ports of a foreign power. The detention, therefore, which is asserted to have taken place, in this case, could not, if it were proved, operate as an ordinary embargo, which puts the object into the legal possession of the Crown, and therefore affords a commencement to the right of prize, if hostilities afterwards ensue, on the part of the Crown. It
could

could not in law have operated to this effect, had it been the intention of the parties to have done so. But the very terms of the letters that passed, are sufficient to convince the Court that during the whole of this previous transaction, nothing of an hostile nature ever entered into the contemplation of the parties. The first letter (a) states, that as the appearance on the part of the colony make it doubtful whether there may not be an intention to deliver up the colony to the *French*, and as my instructions particularly direct me to prevent such a measure, and secure the property of the *East India Company*, and

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(a) Letter, No. 1,

" Whereas from the present unfriendly appearances on the part
" of the governor and council of the *Cape*, towards the ancient
" friends and allies of *Holland*, it is doubtful whether there
" may not be an intention of delivering the colony to the *French*
" faction, which have overrun the mother country; and being di-
" rected by the king my sovereign in conjunction with the Prince
" Stadtholder, to resist the same, and to secure all ships and public
" property belonging to the *Dutch East India Company*, and to
" keep and protect the same from embezzlement, and to pre-
" vent its falling into the hands of the enemy, and also to pre-
" vent all ships of the said country from sailing, unless under the
" protection of a States ship or *British* ship of war; I do there-
" fore in consequence of those instructions, command you not to
" move from this place, but to remain here and keep a strict and
" careful watch over the ship and cargo intrusted to your charge,
" until the same can be restored to the lawful owner; and should
" you refuse to obey the Stadtholder's orders, signified through
" me, you are at liberty to depart with all your private effects and
" property, and all such who choose to remain and abide at their
" duty shall be protected in the due exercise of the same."

" 28th June 1795."

" To the captains and commanders
" of the *Dutch ships* now in *Sy-*
" *monds Bay*."

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protect it from embezzlement, I am to inform you that no vessel will be permitted to sail but under a ship belonging to the States, or a *British* ship. From this it is evident that it was no plan, even of absolute detention, on the part of this nation; but a mere act of caution, to prevent these ships from falling into the hands of the *French*. Another passage in the same letter is still stronger, "you are to remain and keep a strict watch over the ship and cargo, until the same can be restored to the lawful owner;" shewing that there was no design of divesting the *Dutch* owner of his interest.

The second letter (a) states an apprehension of embezzlement and a design of setting fire to their ships, which might endanger the *English* fleet, and made it necessary

(a) Letter, No. 2.

"Whereas I understand that great waste and damage is done to the property of the *Dutch East India* company, every night, by order of the Governor; and have reason to believe he hath sent or intends to send orders of a similar nature to the ships in this Bay, and to set fire to them, which will endanger those of his Majesty under my command; therefore to prevent any such mischievous intentions from being put into execution, I find myself obliged to send officers and men to watch, and make known any irregularity that may take place.

"9th July 1795.

"G. K. ELPHINSTONE."

No. 3.

"*Monarch*, 9th July 1795.

Orders to the captains of *British* ships.

"You are to send an officer, a midshipman, and six men to one of the *Dutch* ships, to be relieved every day, to keep a strict watch that the ships are not plundered or fired, to endanger the fleet.

"They

necessary to send officers and men to prevent any irregularity of that kind. From these letters it appears that the measures pursued were merely of a provisional nature, and were in no degree connected with any hostile purpose on the part of the *English* squadron; and it is not at this day competent to any person, to attempt to fix on them a meaning different from the obvious intention of the parties at that time. The intention is still more strongly evidenced by the fact of letting a ship of war depart. Had any notion of hostility prevailed, this ship of war would have been the first object to be detained; it was so in *Europe* with the *Overyffel*; that ship was immediately detained, and it cannot fail to press itself on the mind of the Court, that these different modes of acting shew more clearly than words can speak, that a different principle of action governed the proceedings. In *England*, the embargo following the general nature of embargoes, was connected with a latent purpose of confiscating the property as prize, if reprisals should ensue. At the *Cape* no such purpose prevailed, it was a state of simple caution only, to prevent the property from falling into the hands of the *French*; and in that state things continued, till after the surrender of the *Cape*; from the mo-

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“ They are to be circumspect in their conduct, and to use
“ nothing belonging to the ships, which are not to be considered
“ as seized.

“ But you are to use every means to protect and assist the com-
“ manders in protecting the ship's cargoes, and the men's private
“ property.”

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ment of surrender, the port became a *British* port, under the protection of the Lord High Admiral; and therefore any seizure made in it of enemy's property, after that time, is to be considered as made in his name; no seizure was made of the ships in question, as prize, till May 1796, and therefore it is submitted they are to be considered as *droits* and perquisites of Admiralty.

JUDGMENT.

Sir William Scott—This question arises on certain *Dutch* ships, which were found at the *Cape of Good Hope*, by the Squadron under the command of Lord Keith; and, which have been proceeded against as prize, on the part of his Majesty, *jure coronæ*. An intervention has been now given, on the part of the Admiralty, claiming them as *droits* and perquisites of Admiralty; and there can be no doubt that such an intervention may be rightly given; because as long as *the office of* Lord High Admiral, though now residing in the person of his Majesty, continues in this kingdom to have a legal existence, it is extremely proper, that the *droits* and perquisites of the office, should continue as anciently distinguished; and although the difference may not be very important as to any immediate consequence under the present application of them, (which is directed by the Treasury, and not by the Admiralty), it is still fit, that they should be strictly determined, and with as much exact observance of the ancient rules, as if the proceeds were carried in the ancient and distinct course. Amongst these rules, I take it to be an established maxim, that the rights of the Lord High Admiral are

are to be considered as rights *stricti juris*, as rights originally granted, in derogation of those higher rights of the crown, which are vested in the crown for general utility : such grants are to be construed strictly on the known presumption, that the crown has not parted with any right which the public wisdom has conferred upon it, farther than the express words of the grant import.

The grant alluded to is to be found recognized in the order of council of *Charles II.* That order, among other things, directs, "That all ships and goods belonging to enemies coming into any port, creek, or road of this his Majesty's kingdom of *England*, or of *Ireland*, by stress of weather or other accident, or mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral ;" but certainly not in foreign ports : It is the first time that I ever heard the idea started, that it was to extend beyond the dominions of the crown, to ports belonging to foreign powers. Besides, it has always been understood that such a coming in must be during the subsisting war.—The very terms used, "by mistake of port, or ignorance, *not knowing of the war*," necessarily imply that ; and all other seizures made any where else, or under any other circumstances, before a war, do belong to his Majesty.

This being the case, let us see how the terms of this order apply to the circumstances of the present case. On the breaking out, I cannot say of war, but of that ambiguous situation into which the irregular conduct of *France* had put different countries, by dissolving

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solving the connection between the governors and the governed, it was found necessary, when *Holland* became exposed to the invasion of the *French* arms, to detain by the strong hand of power, a number of *Dutch* ships in the ports of this kingdom. At the same time, conciliating language was used to the proprietors, and promises were held out to all such as should voluntarily come in, that their property should be restored to them. It is notorious also, that on the declaration of hostilities that ensued, these seizures were enforced with a retrospective operation, on all who had not complied with the terms; and were not considered as mere civil embargoes, but as acts of forcible possession, on which the property so seized, was finally condemned as prize to the crown. Now, unless very strong and solid distinctions can be pointed out between this case, and those which have pursued this course, I see no reason why this should not journey in the same track. Two or three distinctions have been taken: In the first place, it is said, that the detention in the ports of *England*, was a mere civil embargo; and that an embargo of that nature could not extend to foreign ports, where the crown of *England* has no jurisdiction. In the first place, it is not necessary, that the embargo should be exactly of the same nature, in order to vest the rights of the crown; for any mode of forcible occupancy or detainer prior to hostilities is sufficient for the purpose; and secondly, the nature of the embargo in the ports of this kingdom is not very accurately described, when it is termed a mere civil embargo; for it was a detention by actual force applied to them.—The
ships

ships were generally taken possession of by an armed Power; it was not the mere hand of the Custom-house that was laid upon them, in the civil mode of forbidding an egress; but it was a restraint and compulsion, acting by the terror and use of force. The embargo at the *Cape* was likewise an embargo of force; and the very argument that it could not be a civil embargo, because this government had no right to lay on a civil embargo in a foreign port, proves that it was an embargo of force; though, if it was at all necessary that it should partake of any thing like a civil authority, it must be remembered that the Stadtholder's name and authority is likewise employed; but it is notorious, that some ships of war that attempted forcibly to escape, were forcibly detained: that is enough to shew its nature, if it were at all necessary.

Another distinction is, that in this case a ship of war was allowed to go away, whilst in *England*, a ship of war, the *Overyffel*, was detained. I think it does not appear, under what particular motive, the permission to depart was given: it might be under an understanding that the ship was going to some other port, where dispositions favourable to the Stadtholder might be expected. I think the terms of the letter lead us to conjecture that there must have been some such motive, as I have stated; because it could not be supposed that she was allowed to depart, as going to the mother country, when the same letter expressly states, that country to be in the hands of the *French*, as in fact it now remains. That permission to the ship of war, must at any rate be taken, as a peculiar permission,

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mission, influenced by some particular inducement, and therefore affording no ground, by which we can be justified in distinguishing that embargo from what took place here, much in the same style.

The question is indeed, not so much how the matter was conducted, but whether they were in truth detained or not; *that* I must understand, from the very terms of these letters, which it is impossible to understand in any other way; because, when it is said they would not be allowed to depart but under a ship of the State, I must understand it to mean, a ship in the service of the Stadtholder. Looking at this, I must suppose, that it was conducted only with that moderate and soothing language which was used also in this country; but, that the ships were in no degree less under the gripe of power than those under detention here. They were not allowed to depart, unless under a *British* ship, or a ship that had declared its attachment and obedience to the Ally of this country. I must therefore consider it as being as effectual a detention as that used here, and *eodem intuitu*. Indeed it is impossible to suppose, that any real distinction was intended to be made between property detained here, and property detained there: it was all intended to be subject to the same final application, whatever that might be; and, though local circumstances might call for some difference in the apparent mode of treatment for the present, yet the real intention, and the ultimate destination was the same in both. It was not, as was asserted, for the mere purpose of caution, to prevent their falling into the hands of the *French*, but for the further purpose of securing them for
British

British use, in case subsequent events should disqualify the *Dutch* proprietors for restitution.

As for the expression, "that they were not to be considered as seized," I look upon that to be nothing more than the same sort of softer language, of present policy, that was used here, in a situation of affairs that required some management and address; and when one observes the actual and effectual detention for nine months, during which time these ships would have moved off, if they had not been forcibly restrained, it is impossible to suffer the mere expression and style of the letter to alter the real consequences, or distinguish them from those which took place here under similar circumstances.

The *Cape* in the end surrendered, and certainly as a hostile colony: the very next day it is stated, that Captain *Hardy* was commissioned to take the command of one of these vessels; this was before the declaration of hostilities against *Holland* was known at the *Cape*, and it affords, I think, a pretty authentic exposition of the intention under which the first possession was taken. The colours were not formally taken down till a subsequent day, after the declaration of hostility had arrived, but the ships had not been less really under the power of the *English* squadron. Generally speaking, the taking down of the colours is the formal act of surrender; but in the present case it is evident that it was an unsubstantial form, and that no surrender was required.

Under these circumstances, I cannot think that the distinctions taken in this case do materially vary it from

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from the cases of seizure of all other *Dutch* property at the same time; and therefore, I reject the allegation.

Allegation on the part of the Admiralty rejected.

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THE SALLY, Joy Master.

(Instance Court.)

Appeal from Vice Admiralty Courts in the *West Indies*, in a revenue case. Time of appeal—protest of respondent as to one of the sentences, as it was called, overruled.—Whole considered as one sentence.

THIS was a motion made for an inhibition on the Vice Admiralty Court of *New Brunswick*, in a revenue cause, in which that Court had pronounced *March 26, 1798*, that there was no cause of seizure; and in *August 1799* had farther proceeded to decree costs against the seizer.

It was now submitted by the King's Advocate, that the cause was not to be considered as finally determined, till after the decree for costs; that it was from the date of that definitive sentence, that the time for appeal was to be reckoned; and, that the seizer was at liberty, within the accustomed time from that period, to appeal, as well from the sentence of restitution, as from the decree of costs.

No opposition being given, the Court said, I shall suffer the inhibition to issue; it will be for the parties to take their exception.

On the 27th *Jan. 1801*, the case came on again, on act and petition of the party, appearing *under protest* to the inhibition, and praying that it might be relaxed.

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In support of the protest, Swabey and Sewell—The proceedings out of which this application arises have been these: On the 19th of *October* 1795, this vessel with a cargo of provisions, being the property of *N. Godard* and other merchants of *America*, was seized in the port of *St. John* in *New Brunswick*, and proceeded against on the part of the collector of the customs, for importing such provisions contrary to statute: on the 9th of *March* 1798, the Judge of the Vice Admiralty Court of *New Brunswick* pronounced “that there was no probable ground of seizure;” and on the 1st of *August* 1799 he proceeded farther to pronounce “the costs of the suit to be paid by the seizer.” The suspension of the proceedings during this interval was occasioned by an appeal, which the seizer entered *apud acta*, against the first sentence, accompanied by an apprehension on the part of the Judge that he was stopped from proceeding farther in the cause; during this time the Judge waited, but at length finding that no inhibition had issued against him, he finally proceeded, on the 1st of *August* 1799, to make a farther decree on the question of costs.

To the appeal, prosecuted from this decree of costs on the part of the seizer, the respondents are ready to appear absolutely, and submit the merits of the question of costs to the Court. But as to the former sentence, it is submitted on their part, that the time of appeal is elapsed, and therefore that the seizer must be pronounced to have deserted his appeal on that sentence. The time for appeal is known to be twelve months; originally it was expected, that the whole cause would be finally determined within that term; and so late as the middle of the last century, it was the practice to make a special application to the Court to be admitted to a second year. This practice has

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fallen into difuse, as to the termination of the suit; but as to the term within which the appeal should be prosecuted, it still remains according to the practice of the civil law, which is recognized in a late stat. 38 G. 3. ch. 38. sect. 2. for regulating the time of appeal on seizures of another nature (*a*), as the law of nations, and as the law proper to be adhered to in Courts of Admiralty.

That the feizor was understood, on all sides to have appealed from the first sentence, is evident from his words, and the conduct of the Court below. The Judge *deferred* to his appeal; had it been a mere protestation of appeal, and not an *actual* appeal, the Judge might have assigned the party a term within which to prosecute it; but being an actual appeal, and immediately allowed by the Judge, the Court by that act, *in law*, concluded itself; and did *in fact* accordingly abstain from proceeding farther in the cause; and at last, when he went on to entertain the question of costs, the appellant himself alleges, not generally, that he appeals, but “*that he farther appeals.*”

The term, therefore, for the appeal on the first point, is to be reckoned from the actual appeal interposed on the former sentence; from which time it was near a year and a half before the appellant took any step to prosecute his appeal, and therefore he is to be pronounced to have deserted it; and the respondents are entitled to have the inhibition relaxed, as far as it applies to the first decree.

On the other side, the King's Advocate and Croke— It is not very easy to understand what is meant by representing the proceedings of the Court below, as two decrees and two sentences. According to

(*a*) In prize causes.

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the practice of the Court of Admiralty, a party can only appeal from a definitive sentence, or a decree having the force and effect of a definitive sentence; and therefore the power is reserved to him of appealing at the same time from all grievances, that have been done previously, or inflicted, by the Judge, from whom the appeal is brought. In the Ecclesiastical Courts, following the different practice of the canon law, it is otherwise; and if a party proceeds to take any step, after the grievance complained of, he is held to have *perempted* his appeal. This is a distinction arising from the different processes of the civil and the canon law: but in the Admiralty Courts, which are regulated by the former, the party has an undoubted right to appeal at the final sentence; which, in this case, must be taken to be the decree on the question of costs; and whatever may have been done irregularly, or said in informal language, before this time, cannot deprive him of this right. It is from this time therefore, (1st August 1799), that the term of appeal is to be reckoned; and in respect to that, there is no attempt to say, that his time had elapsed before the commencement of the proceedings here; as to the understanding of the party, it is not material whether he was under a mistake or not, but by his conduct he appears to have waited for the final decree; notwithstanding the protestation of appeal, in the first instance, no bail was given or required for prosecuting the appeal, till after the decree of 1st August 1799, and then bail was given to prosecute the appeal on both points.

Swabey—In these causes it is not necessary to give bail, as in prize causes, therefore no inference arises from that.

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JUDGMENT.

Sir *W. Scott*—This is an application under protest, as I understand it, against the form in which the inhibition is now drawn, *as upon two sentences*; because it is not contended that it is not good against one, that is, against the last sentence, or that the party is not bound to appear to it, or that the Court is not bound to determine on the second question.

I should have been obliged to the gentlemen who have argued for the appeal on the last sentence exclusively, if they had put me in possession of any manner of determining the second question without considering the other at the same time. The former sentence, as it is called, pronounced that there was no probable cause of seizure; which, in effect, by necessary implication did determine that costs were due; therefore it would be impossible for me to administer substantial justice on this question of costs, whilst there stands such a judicial declaration, which I am not at all at liberty to consider, whether it is well founded or not. The Court must consider both sentences, or it must dismiss the appeal altogether, or it must follow up with a blind and mechanical obedience, that declaration of the inferior Court, by giving costs as a necessary consequence; on the propriety of which it has no power to deliberate or enquire.

I need not observe that it has never been the practice of this Court, on appeals from Vice Admiralty Courts in the *West Indies*, to tie them down to nice rules of practice, which we know are not much attended to in those Courts; the practitioners there having not much of that sort of business, which familiarises the minds of men to great exactness in these matters. There are however great interests con-
fided

fided to those Courts, particularly with respect to the enforcement of the revenue laws; and it might be the means, as well of oppressing individuals, as of defrauding government, if, on appeals, this Court was to judge by those correcter rules of practice, which would be observed here in similar cases, (if this Court exercised any original jurisdiction upon them), but which are not familiar to the practitioners there, and appear not to be attended to in the original proceedings.

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This Court therefore, looks to find out the real merits of the question, without attending much to the irregularity of proceeding in which they are frequently involved and buried. It takes no advantage of such irregularities against the one party or the other. It takes the question, and considers and treats it, as It conceives it ought to have been considered and treated in the Court below, and pursues the real meaning of the parties, as it supposes that meaning would have been led and directed by practicers, capable of conducting it with precision and regularity.

With respect to time, it particularly has never been the practice of this Court to construe the limitation of time for appeals, with the same strictness as would be applied to appeals from Courts of this country. It has been held that the statute of H. 8. does not apply to cases in the plantations, but that it is left to the discretion of the Court to entertain an appeal. The circumstances of the present case shew the reasonableness of this exception; for although the only fact to be examined was, (as far as I can infer from what is at present before me), whether an *American* ship came into the port of *St. John* in breach of the navigation act, in *October* 1795;

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it is not till two years and a half after, although the proceedings were immediately commenced, and almost in the very spot where the transaction happened, that the Judge proceeds to sentence; in a matter, on which one would suppose, that even a cautious and deliberate justice might have been dispensed within six weeks; and the Court is then delivered of only a half sentence,—an imperfect thing, which requires the labour of a year and a half more in order to perfect and bring it into regular shape and substance. When such indulgence as this, in point of time, is allowed in these Courts, this Court will not be too precise in holding the parties strictly to their time of appeal; nor will it look with scrupulous accuracy to the phraseology and style of their minutes, nor to the common errors, in which both the parties and the practitioners appear to have been involved.

In the present case the Judge pronounces, “that
“there is no probable cause of seizure, and that the
“ship and cargo ought to be restored.” The seizer immediately appeals (as he says); and the Judge upon that, abstains from proceeding any further, makes no order as to costs, but leaves the sentence in this suspensive state, implying that costs ought to be given, but not giving any costs expressly; certainly the appeal or protestation, or whatever it is to be called, of the seizer, needed not to have prevented the Judge from unfolding his sentence, and expressing in terms, what it is evidently intended to imply. It could hardly have been deemed a new act, if he had gone on to infer his conclusion that costs ought to be given against the seizer; however he does not do this, and the matter remains in this suspended state for another year and a half; all parties appearing to stand agast and motionless, the party that had ap-
pealed

pealed not prosecuting his appeal; the party appellate not urging the prosecution of that appeal, nor the Court directing any effectual steps to be taken for the purpose. Finally, the party which had obtained this half sentence comes before the Court, and prays a determination upon the matter of costs and damages; then the Court makes the direct judicial declaration, that costs and damages are due. The appeal from this sentence, and likewise from the other, is regularly pursued. Security is required, and is given for the effectual prosecution of it; and it seems to have been the common understanding of all parties, that the whole merits of the case were devolved to the judgment of the superior Court.

Indeed the absolute impossibility of considering and determining with any degree of justice, the matter of the last sentence taken separately from the other, proves in the most decisive manner the indissoluble connexion that subsists between them, and the absolute necessity of considering them in conjunction.

In my view of the latter sentence, it is nothing else than a mere distinct verbal explication of what is implied in the first; unless the first is examined, it is impossible to examine to any effect of justice the second; and the parties having admitted that they are forced to appear to the appeal upon the second, which decrees costs, I think that they are *ex necessitate rei* bound to appear likewise to the appeal upon the first, which decides that there is no just or probable cause of seizure.

Protest overruled.

An important question having lately occurred in the case of the *Fabius*, respecting the extent of the Vice-Admiralty jurisdiction in revenue matters, it will be brought forward in this number, without regard to the regular order of dates.

(Instance Court.)

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1799.THE FAVOURITE, NICHOLAS DE JERSEY late
Master.

Mate becoming
master, by cap-
ture of former
master, allowed
to sue for wages
as mate through
the whole time.

THIS was a case on petition for wages, and sundry other charges, on the part of *Joseph Grout*, formerly mate, and late master of the vessel, against the proceeds of the ship *Favourite*, an American ship, which had been proceeded against by a *primum decretum* on the part of — *Carver* of Gosport, and *Torlades* and Company of Lisbon, holders of bottomree bonds, and sold by a decree of this Court, bearing date 17th day of June 1799.

The history of the vessel as it was detailed in the several proceedings before the Court was :—That in the month of *April* 1797, the above vessel belonging to *S. Lewis* of Boston, and commanded by *Nicholas de Jersey* master, sailed with a cargo of flour from *Havre* to *Brest*; and being taken as prize by a British cruiser, and brought to *Portsmouth*, was restored by a sentence of the Court of Admiralty; that she was then repaired, refitted, and re victualled, on money taken on bottomree, *September* 28th 1797, of — *Carver* of *Portsmouth*, to the amount of 1283*l.* 17*s.* 8*d.* and sailed to *London* in ballast, where it was determined to proceed with the ship to *St. Ube's*, there to load a cargo of salt for *Charlestown*; that she went to *St. Ube's*, and having sailed laden with a cargo of salt, was forced into *Lisbon* in distress, where a farther sum of 100*l.* was taken up on bottomree, from the house
of

of *Torlades* and Company; that the vessel then proceeded to *Charlestown*, but that the master and supercargo, *Taylorson*, being unable to discharge the aforesaid bottomree bonds, renewed the same by a farther bond of hypothecation, bearing date 14th April 1798, and covenanted to pay the aforesaid sums with interest, within a reasonable time after the arrival of the ship at *Gosport*, whither she was then bound; that on that voyage she was captured by a *French* privateer, 24th April 1798, and the aforesaid master *Nicholas de Jersey* was taken on board the privateer, and had never since rejoined the ship; that on her capture, the said vessel was taken to *St. Domingo*, and released, and sailed again for *Charlestown*, 2d Sept. 1798, under the command of *Grout* the mate (now become master from the absence of *Nicholas de Jersey*); that the vessel being again laden for *London*, the aforesaid mate *Grout* was under the particular circumstances of the case, by the appointment of *Taylorson* the supercargo, and with the permission of the Collector of the Customs, permitted to clear out as master; that on her arrival at *London*, the aforesaid bonds being presented and not paid, the ship was arrested, and proceeded against, and finally sold by a decree, bearing date 17th June 1799, on the petition of *Runquest* and *Cowie*, agents of the house of *Torlades* and Company, and holders of the bottomree bond, executed to — *Carver* of *Gosport*.

The summary petition of *Joseph Grout* set forth that he was hired by *Nicholas de Jersey*, at *Gosport*, April 1797, as mate, to serve on board the said ship, at 35 dollars per month; that he continued on board the said ship in the said capacity till her arrival at *Charleston*,

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Charleston, 4th February 1798, and not being then paid or discharged, did, at the particular request of the master *Nicholas de Jersey*, agree to continue on board, and in the service of the ship, on the further voyage; that in the prosecution of that voyage, he became master in the absence and detention of *Nicholas de Jersey*, as before recited.

The schedule of accounts annexed to the petition contained charges for wages at 35 dollars *per* month, as mate, from 16th April 1797 to 20th May 1798

103 7 9

From the 20th May 1798, the time when the said mate began to act as master, to the 19th June 1799, at 60 dollars *per* month, the same as would have been paid to *Nicholas de Jersey* - -

175 11 0

For balance due on account of said ship, as *per items*, &c. above cash received - - - - -

84 16 10

£. 363 15 7

Against the petition, on the part of the bottomree bond-holders, Arnold—This is a petition, which is liable to so many objections in different parts of it, that the Court will find only one article that can be sustained: it sets out by a demand of wages, for services performed as master; but it has already been decided in the common law courts, in the time of Lord *Holt*, 12 *Mod.* 405. that a suit cannot be maintained in the Admiralty Court for the wages of a master; and on these grounds, that although mariners are supposed

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posed to contract on the credit of the ship, the master's contract is altogether of a personal nature, on the credit of his owner. It will be said that these cases do not exactly apply to the circumstances of this case, for that this man went out *as mate*, and therefore that his original contract was not on the credit of the owner, but of the ship, and that he succeeded to the office of master, only by devolution, on the capture and detention of the former master: the ship has, however, since that succession, been into an *American* port, the country of the owner, and therefore since that time he stands in the condition of a master, originally appointed, and on the credit of the owner. There are however other authorities which reach this distinction, 2 *Strange* 937. *Read v. Chapman*, "A man went out as mate, and on the death of the master succeeded to the command and brought home the ship, and sued in the Admiralty Court for his wages *as mate*, and for a further allowance after he became master; a prohibition was granted, *quoad* the time he was master, and refused *quoad* the time he was mate;" this will be sufficient to dispose of that article: another article contains a demand for expences usually incurred by masters for the payment of mariners wages. But there have been cases on this point also, *Carthew* 518. *Molloy* 357. *Fortes. Rep.* 230. where a master having sued in the Court of Admiralty for seamen's wages paid by him, a prohibition was granted. There is also a further charge for a cable purchased at *Deal*, which is evidently a debt for which a remedy must be sought elsewhere; there are also other disbursements which fall

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fall under the former objection, and must dispose of his whole demand in character of master.

In support of the petition, Swabey—It was said, in *Clay v. Sudgrove*, Salk. 33. “that it was not reasonable that the master should sue for wages, where he commences the voyage as master.” In this case it is a succession in a foreign port, *de jure*, for the necessary service of the ship. In the case cited in *Strange*, it was a suit against the ship, in that respect materially differing from the present, as the ship has been already sold, on the proceedings of other parties; and our act is only *against the proceeds*. It has been frequently said in this Court, that a distinction might be made, and that masters and (a) *material men* also, by the indulgence of the Court, may be allowed to be paid *out of proceeds* in the hands of the Court, although they would not be allowed to proceed originally against the ship.

Court—I could wish the cases to be looked into, respecting persons allowed to take money *out of proceeds*, who are not allowed to sue originally; I think what is said by Dr. *Swabey* is true, that it has been allowed to *material men*, but the cases to which I refer, were cases, in which there might be no per-

(a) By material men, in the style of the Court of Admiralty, are meant the persons who furnish and construct the different materials of ships: shipbuilders, ropemakers, &c. &c. See a learned argument of Sir L. Jenkins, before the House of Lords on the competency of such persons to sue originally in the Admiralty. *Life of Sir L. Jenkins*, vol. 1. p. 76.

son objecting, or where there remained an undisputed surplus, after payment of the debt, which was the original cause of the suit.

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Arnold—In this case the objection is taken on the part of the bottomree bond-holder, who is not yet paid his debts.

JUDGMENT.

Sir *W. Scott*—It has been repeatedly decided that a master cannot sue in the Court of Admiralty for his wages; because he is supposed to stand on the security of his personal contract with his owner, not relating to the bottom of the ship, and therefore he has been prevented from suing here. A case has also been cited, in which a mate, who had become master during the voyage by the death of the former master, was also prohibited from suing in the latter character, his contract having been made only in the capacity of mate: if that case had not stood in the way, I might have been disposed to entertain this suit; because, having contracted originally as mate, and becoming master in consequence of subsequent events, it is still such a demand as might be taken to arise out of his original contract. His original contract being not only, that he shall perform the duties of mate, but also, by necessary implication of law, that he shall in case of necessity take upon himself also the duties of master; for, by the maritime law, the mate is, *bares necessarius* to the employment of master in case of necessity; it might therefore have been understood as a thing mutually understood in the original contract, and foreseen and provided for at the time, and in the act of

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of forming it: the Court might have been induced to sustain such a suit, not under the view of a contract entered into by this man as master, but as a consequence arising originally out of the primary contract as mate, over which contract this Court has an undoubted jurisdiction. But since it appears by the cases cited, that the courts of common law have determined otherwise, and have granted a prohibition on this point; the petition must be reformed according to those determinations; but, excluding the *quantum meruit* due to him as master, he is still, I hold, entitled to proceed for his wages as mate; he must apply elsewhere for his *quantum meruit*, for those additional duties performed by him as master.

Arnold asked—Whether it was not the intention of the Court that the demand of the petitioner, as mate, must end with the day of his appointment to the office of master?

Court—My opinion is, that he is still entitled to his wages as mate, and that he must go elsewhere for the reward of the additional services performed as master. I consider his new character of master as superinduced to that original one of mate; he contracted to serve as mate, and it is a part of that contract legally implied in it, that he shall likewise act as master in case of the death or removal of the actual master; but I do not think that the character of mate is necessarily merged in that of master, or that his title to a mate's wages is totally extinguished, by his acquired title to a *quantum meruit* for his additional service as master; unless it can be shewn, that the office of mate was regularly devolved upon some body

body else, and the duties of it were entirely performed by that other person: it is the inclination of the Court to aid the present suitor as far as it can consistently with law, as it clearly appears that he has no chance of recovering elsewhere from an insolvent party.

In respect to the distinction taken between an original suit, and a permission to be paid out of the proceeds, upon enquiry no instance has been found, in which a master has been permitted to sue against proceeds in the Registry, except in cases of mere remnants and surplus; and not even then, if there have been any adverse interests opposing it.

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THE PERSEVERANCE, PITTOR Master.

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1799.

THIS was a case of a ship that had been a *British* prize, sold under a sentence of condemnation in *Norway*, to a *Swedish* merchant, and was seized on coming to the Isle of *Guernsey*, on the part of the former owner: an appearance being given for the neutral purchaser, it was submitted, on his part, that, if the vessel was to be restored to the former owner under the authority of the *Fladøyen*, it was still but reasonable, that some compensation should be made for considerable repairs which the ship had undergone, in the possession of the *Swedish* purchaser, to the amount of 205 *l*.

Amelioration of prize ship, purchased by a neutral, under illegal condemnation in *Norway*:—allowance made, on restitution, to original owner.

Vol. I. p. 135.

JUDGMENT.

Sir *W. Scott*—It is a general rule, undoubtedly, that whoever purchases under an illegal title, does it

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at his own peril; and must take the consequence (both in his purchase and in his own subsequent expenditure upon it) of his inattention to his own security: but I think this was not a title so notoriously bad, at the time when this purchase was made, as to bring it fairly under the application of the general rule to its utmost extent.

The Court has had occasion to enquire into the validity of such purchases, and has, upon a regular discussion, pronounced them invalid; and if henceforth, neutrals shall continue to purchase under such flimsy titles, they must take the consequences of their own imprudence. But it may be too much to apply this maxim without any alleviation, to a person who has heretofore bought under a practice, which, though illegal, was too prevalent in some ports of the North of *Europe*: it appears that a sum of money has been expended on the repairs of this vessel, by which the claimant will be benefited, though not to the amount of the sum laid out; something must be allowed for wear and tear; and besides, the party who has expended this sum, has had the use of the vessel in the mean time: I shall therefore not allow the whole sum, but I shall take a moiety, and I shall allow that, in consideration of the benefit which the original owners are likely to receive from the amelioration.

Sum asked 205/.

Given 102/.

Ship restored to the former owner on salvage.

(Instance Court)

THE ISABELLA, BRAND Master.

Nov. 22d,
1799.

THIS was a case of a summary petition (a) on behalf of the widow and representative of *G. Carlson*, late chief mate of the said ship, to recover a sum of money due for wages, on a voyage from the port of *London* to the coast of *Africa*, &c. and from thence to the *West Indies*. The demand was for 26 *l.*, at the rate of 4 *l.* per month under agreement; and beyond that, for 70 *l.*, as the value of a privilege of one slave, said to be a part of the agreement, and a privilege due under the ordinary practice of that trade, according to average price at the port of delivery.

Mariners wages,
ship's articles,
to be signed
before clearing
officer, &c.,
to be conclusive:
—Act 2 G. 2.
c. 36., 2 G. 3.
c. 31., 39 G. 3.
c. 80. s. 27.—
Demand of ad-
ditional privilege
under custom of
the trade, not
allowed.

Against the petition, Swabey—This mariner died before the slaves were delivered, on the passage to the *West Indies*; and therefore, it is not clear that he would be entitled by the custom, if it was proved to exist: but with respect to that part of the demand

(a) The first article of the petition pleading the hiring, stated, "that the master, &c. did hire the said *G. Carlson* to serve as chief mate on board the said ship, at and after the rate or wages of four pounds the month, with the benefit of a slave, when the cargo was taken completely on board, in *Africa*," without any mention of the custom of trade:—and the schedule annexed to the petition was, wages for six months and sixteen

days, — — — — —
To a slave as per agreement, the value of which
is 70 *l.* or thereabouts, — — — — —

£. s. d.
— 26 5 6

70 0 0

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for

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for privilege, the parties are precluded by their own shewing, on other grounds; for it is stated to be under agreement, and yet it makes no part of the contract, as it ought to have done, under regulations of the old act 2 G. 2. c. 36., made perpetual, 2 G. 3. c. 31. which have been again inserted in a late act, 39 G. 3. c. 80. s. 27. respecting this particular trade; by which it is required, "that articles of agreement shall be signed "by the master, officers, and seamen "before the ship leaves port, which shall be conclusive, and no other form used."

If there was in this case any such privilege allowed, it ought to have made part of the articles; that not having been done, it is a competent objection to take on the part of the estate of the defendant, who has since become a bankrupt, that the petitioner is precluded from this part of his demand, on his own shewing.

For the petition, Sewell said—That it did not appear that the regulations of the act were meant to apply to those things which are due under the ordinary custom of the trade, under which, this privilege had been always enjoyed.

Swabey—If it is a custom, it ought to have been distinctly pleaded.

Court—Instead of being pleaded as a custom, it is pleaded under the agreement; although I do not find in the articles of agreement, one word of the general custom, nor the least mention of the privilege of a slave as matter of special agreement. The general

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act for the regulation and government of seamen in the merchant service, 2 G. 2. c. 36. made perpetual, 2 G. 3. c. 31., directs, "that if any seaman
" or mariner enter or ship himself on board any
" merchant ship or vessel, on any intended voyage
" for parts beyond the seas, he and they so entering
" themselves as aforesaid shall, and they are hereby
" obliged to sign such agreement or contract within
" three days after he or they shall have so entered
" themselves on board any ship or vessel, in order to
" proceed on any voyage as aforesaid; which agree-
" ment or agreements, or contracts, after the signing
" thereof, shall be conclusive and binding to all par-
" ties, any custom or usage to the contrary notwith-
" standing." I take it to have been the intention of the general act, as well as of the act lately passed, 39 G. 3. c. 80. s. 27., for the regulation of this peculiar trade to *Africa*, to render the agreement as distinct and definitive as possible, to prevent any part of it from resting in parol, or vague conversation, which is at all times so difficult to be ascertained in a court of justice; and in no cases more so, than in such as relate to the transactions of this class of persons. If there had been no such act, or if it had been less imperative, still the rule is no more than what the discretion of the Court would have wished to apply to such a subject. The late act states; "and for the better regulation, en-
" couragement, and preservation of the health of the
" officers and seamen employed in ships or vessels
" trading to the coast of *Africa* for slaves, and from
" thence to the *West Indies* and *America*, be it fur-
" ther enacted, that from and after the first day of

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“ *August* next after the passing of this act, before any
 “ ship or vessel shall proceed to sea, the master, of-
 “ ficers, and mariners shall sign and execute articles
 “ of agreement, and a muster roll, in the presence
 “ of, and witnessed by, the clearing officer, and one
 “ of the tidemen of the port from whence the ship
 “ departs; and a duplicate of the articles of agree-
 “ ment and muster roll, duly signed and executed,
 “ shall be delivered to the aforesaid clearing officer,
 “ in order to its being lodged with the proper officer
 “ in the custom-house, according to the forms here-
 “ unto annexed; which agreement shall be conclu-
 “ sive to all parties for the time contracted for, and
 “ no other form whatsoever of articles of agree-
 “ ment or muster roll, shall be used, under the pe-
 “ nalty of fifty pounds; one-half to be paid to the
 “ use of *Greenwich* hospital, and the other half to
 “ the informer or other person who shall sue for the
 “ same in any of his Majesty’s courts of record.”
 That being the statutable rule, it is impossible to set
 up a demand of this collateral nature, which exceeds
 twice the amount of the principal agreement, and to
 support it on the plea of a customary right; especially
 for a customary right which was so unknown, that
 the party himself was not sufficiently apprized of it,
 but pleads it as matter of special agreement. It is
 said, that the existence of such a privilege is proved
 by the terms of the wages; the master and mate
 having less, by their agreement, than the ordinary
 mariners; but it is impossible for me to say, that be-
 cause their wages are so small, that therefore this
 particular privilege of a slave exists. I may have my
 surmises, that they might enjoy some other additional
 advantages;

advantages; but it is impossible, that I can come to a conclusion, that therefore this particular privilege of a slave exists, which so much exceeds the amount of the contract. If any such understanding prevails, care ought to be taken to insert it in the articles. I must reject that part of the petition.

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Petition directed to be reformed,

(Instance Court.)

THE FABIOUS, COWPER Master.

Nov. 27th,
1800.

THIS was a case, in which a material question arose respecting the extent of the jurisdiction of the Vice Admiralty Courts in revenue matters.

The Vice Admiralty Courts in the *West Indies* have no jurisdiction over offences committed against revenue laws, out of their respective Islands.

It was the case of an *American* ship and cargo, taken as prize, 18th *February* 1798, by the *Lark* privateer, and carried to *New Providence*, where she was restored by consent, *February* 25th. On the same day she was again seized by Capt. *Church*, of his Majesty's ship of war the *Topaz*, lying in the harbour of *Nassau*, in *New Providence*; on suggestion that she had exported from *Savannah la Mer*, in *Jamaica*, her last clearing port, logwood, &c. in violation of the plantation laws of this kingdom. On this ground a libel of information was filed; and proceedings were regularly pursued in the Vice Admiralty Court of *New Providence*, and the Court pronounced a sentence of confiscation of the ship, tackle, and cargo, &c.

The cause was now brought before the High Court of Admiralty, on appeal from this sentence, on the part of the master, claimant of ship and cargo.

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In support of the appeal, Laurence and Swabey— argued, on the merits, that the ship had gone into *Jamaica*, with provisions, &c. in consequence of a proclamation from the Governor of *Jamaica*; and that the logwood had been weighed by the custom-house officer, and shipped with his privity and knowledge. They were proceeding farther to dispute the competency of a Vice Admiralty Court to take cognizance of a breach of the revenue laws, committed without the limits of its local jurisdiction, and in another island, —when the Court stopped the argument.

*Court—*I have a strong persuasion that there has been a determination on this point; and that it has been decided, that Vice Admiralty Courts have no authority to take cognizance of offences committed not within the limits of their local jurisdiction. I shall defer this cause, that an inquiry may be made into the precedents on this point.

On the 11th *December* 1800 the cause came on again, when Dr. *Swabey* produced the case of the *Vrouw Dorothea*, Block master, determined before his Majesty's High Court of Delegates, at *Serjeant's Inn*, June 17, 1754.—Present,

Sir *Michael Foster*;
Sir *Sydney Stafford Smyth*,
Mr. Justice *Gundry*,
Dr. *Walker*,
Dr. *Bettesworth*,
Sir *Ed. Simpson*,
Dr. *Collier*,
Dr. *Ducarel*.

Vrouw Dorothea, Block,
an. 1754.

[The facts of that case were, that the *Dorothea*, a Dutch ship, from *Amsterdam* to *Curacoa*, was taken by the *Wager* man of war, 26th *August* 1746, and carried to *Jamaica*,

Jamaica, where she was proceeded against as prize, and restored; after which the master petitioned the governor for leave to sell some part of his cargo, and having sold part under his permission, and the inspection of the naval officer of *Jamaica*, sailed from that port, but was driven back in distress, when he obtained permission to unload and careen, and sell a farther part of his cargo to defray his expences; she again sailed, and on the 7th August 1747 was again taken as prize by the *Trelawney* privateer, and carried to *Charlestown*, where she was proceeded against as prize, and restored with costs; but on the 7th December 1747, as she lay off *Charlestown*, she was seized by *W. Hopton*, deputy naval officer, and proceeded against as forfeited, for having imported into, and exported out of *Jamaica*, goods contrary to law. After the usual proceedings the ship was condemned, July 4th, 1748, and the master, *Block*, appealed to the High Court of Admiralty of England.

The libel of appeal was not in common form, but special, in objecting against the jurisdiction of the Judge appealed from. "That a certain cause, civil and maritime, was unjustly brought before the Honourable *J. Green* in *Carolina*, for a pretended breach not within the jurisdiction of the Court." This objection was supported on the part of *Block*, the master, by an allegation, in which the character of the ship, and the previous circumstances of the voyage were set forth, and in which it was pleaded, "that in fact no such goods were imported or exported, and that if they had been imported or exported, no suit could be commenced on that act before the Judge of the Vice Admiralty Court of *South Carolina*, for a breach of the plantation laws

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Vrouw Dorow-
tied, an. 1754.

“ committed at *Jamaica*; and that the Judge of *Carolina* had no jurisdiction to condemn or acquit for any act done at *Jamaica*.” The allegation was admitted, and exhibits produced, by which the facts were proved, but no witnesses were examined; and on the 12th *July* 1751, the High Court of Admiralty pronounced, “ that the Vice Admiralty Judge of *Carolina* had no jurisdiction.” From this sentence *Hopton* appealed to the High Court of Delegates, where the cause was elaborately argued, by the King’s Advocate, Mr. *Murray*, Attorney General, Dr. *Pinfold*, Dr. *Hay*, and Mr. *Pratt*, for the appellant *Hopton*; and by Mr. *Hume Campbell*, Dr. *Jenner*, and Dr. *Smalbroke*, for the respondent *Block*.

By a note of the case (with which I have been favoured by my learned friend, Dr. *Swabey*), an objection appears to have been strongly pressed before the Court of Delegates, respecting the jurisdiction of the High Court of Admiralty to receive appeals from the Vice-Admiralty Courts on revenue causes; on the ground that they were not in their nature causes civil and maritime, and under the ordinary jurisdiction of the Court of Admiralty, but that it was a jurisdiction specially given to the Vice Admiralty Courts by stat. 7 & 8 *W. 3. ch. 22. s. 6.* which did not take any notice of the appellate jurisdiction of the High Court of Admiralty in such causes. This point was fully argued and determined (a), and on the 17th *June* 1754, “ the Judges pronounced

(a) The same point has since, I am informed, received the unanimous concurrence of all the Judges, on a reference from the Privy Council. It was contended, that the appeal more properly lay to the

"nounced for the appeal, and complaint made and interposed on the part and behalf of *Block* the master, to the High Court of Admiralty of *England*, from the Judge of the Vice Admiralty Court of *South Carolina*; and that the said appeal and complaint were made and interposed for causes true, just, and lawful. Wherefore the Judges revoked the sentence of the Vice Admiralty Court of *South Carolina*, and decreed restitution of the said ship, tackle, &c. and did farther condemn the appellant *Hopton* in the damages sustained and incurred by the owners of the said ship and her cargo, by the seizure and detention thereof at *South Carolina*; and did farther condemn the appellant in costs of suit, as well in the first and second, as in this instance of the cause (a)."]

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(a) From the register of the High Court of Delegates.

On the production of this precedent, the King's Advocate took an exception, that no fact of exportation appeared to have been stated in that case; and that there was a material distinction between the offences of importation and exportation, and the necessary modes of proceeding against them; that the former might be justly amenable only to the local jurisdiction of the island where it was committed, because it was fully within the reach of the Court; but that the offence of exporting, contrary to the statutes, could not be considered as complete, till the ship had actually got out of the port and out of the district of the local jurisdiction. That the authority of the case

the Privy Council, the general court of appeal in all plantation causes, and the Privy Council had entertained some few revenue causes from the Plantations. The opinion of the Judges was, that it lay to the High Court of Admiralty.

stated

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1800.

stated ought not to be carried farther than the facts of the case; which did not appear to amount to a case of exportation; that it had fallen within his observation to see other cases, in which the Vice Admiralty Courts did proceed to take cognizance of frauds committed in other islands.

JUDGMENT.

Sir *W. Scott*—I have had occasion to observe that too; and I am aware of some inconveniencies that may possibly arise on either side. But if this point has been decided by the Court of Delegates, a Court very ably composed, I shall not hold myself at liberty to look into the question of convenience. If inconveniencies arise, they must be guarded against by provisions framed under an authority of a still higher nature. But it is very evident to me that the inconveniencies would be ten times more intolerable, if the cruisers could carry ships charged with offences against the revenue laws to any remote jurisdiction they might think fit: The injustice to which it might lead, would be horribly oppressive to the individual. With respect to the distinction which has been taken between importation and exportation, I need say no more than that the sentence of the High Court of Admiralty, which was affirmed by the Delegates, is, “That the Judge having heard Advocates, as to the jurisdiction of the Judge appealed from, declared that the Judge appealed from had no jurisdiction, to enquire as to the *importation* or *exportation* of goods at *Jamaica*, contrary to the act of parliament.”

Laurence prayed interest.

Court

Court—I observe that the Court of Delegates did condemn in costs and damages: After that decision, I am to consider it as clear and settled law that the Vice Admiralty Court of *New Providence* had no jurisdiction whatever, and that the whole of the proceedings there, were vexatious and null; and I think I am bound to decree costs and damages, as the other Court did when the matter was *res integra*, and might be thought a very fit case for judicial determination. I shall consider myself bound by the authority of that decision, settled by such a Court, after a very deliberate argument; and I shall follow the direction of that sentence, in annulling the decree of the Vice Admiralty Court of *New Providence* in this case, with costs and damages.

The
Facts.

Nov. 27th,
1800.

THE SUSAN, BARZILLAI HUSSEY Master.

Dec. 3d,
1799.

THIS was a case of an asserted *American* ship, taken on a voyage from *Dunkirk* to *St. Ubes*, in ballast, with an intention of proceeding with a cargo of salt, as it was contended on the part of the captors, to the *French* South whale fishery; but as it was represented on the part of the claimant, on an ulterior voyage only from *St. Ubes* to *New York*.

French whale
fishery: Assert-
ed *American*
vessel: Effect of
suppression of
enemy's part
interests: Con-
demnation.

For the Captors, King's Adv. and Advocate of the Admiralty—This vessel was taken going under *American* colours from *Dunkirk* to *St. Ubes*, with an intention of proceeding afterwards, as it is asserted, to *New York*, and it is claimed for Mr. Mark Coffin of *Nantucket*. There is the original measuring bill on board, bearing date, *New Bedford*, July 4, 1795, in which B. Hussey is described

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described as master ; but there are two subsequent indorsements, one at *New Bedford*, 23d *July* 1796, by the collector,—“ *Isaiah Hussey* having taken the oath required by law, is at present master of the within vessel, in lieu of *B. Hussey*, late master ;” and another at *Dunkirk*, 31st *January* 1797, by the *American* consul—“ *B. Hussey*, having taken the oath required by law, is at present master of the within vessel in lieu of “ *Isaiah Hussey* late master ; signed *C. F. Coffyn*, consul “ for the United States of *America*.” It is clear, therefore, that both the *Husseys* have been concerned in this vessel in her previous occupation, whatever that may turn out to have been. She appears to have been a *French*-built vessel, engaged in the South whale fishery, and on those voyages returning to *Dunkirk*.

The account which the master gives of her former occupation is, “ that the ship, since the deponent has belonged to her, sailed from *New Bedford*, on the whale fishery, and then returned to *New Bedford*, and afterwards sailed with the same cargo to *Dunkirk*, and there delivered it to Messieurs Brothers *Dubeaque*, merchants there, and then sailed from *Dunkirk* on the whale fishery, and returned with the produce to *Dunkirk*, and there delivered it to the said Brothers *Dubeaque*, in or about the month of *May* 1798 ; and continued there till the 18th day of *July*, when she sailed on the present voyage,” proceeding, as we submit, on a similar ulterior destination to the whale fishery. On these grounds it is submitted that a domiciled *French* character is stamped upon this vessel by her employment, be the property in whom it may ; but many circumstances that appear in

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in these documents, and in the management of the vessel, shew not only strong marks of a voyage back to *Dunkirk*, in the same course as before, but also afford great reason to suppose that the actual property of this vessel belongs to persons resident at *Dunkirk*. She is professedly going to *America*, under the command of *B. Hufsey*, appointed by these persons, as it is expressed, "for and in the name of the owners." The terms are, "that he was to receive from the owners
" or their agents 30 Spanish doubloons per month,
" and five per cent. for all freight she should make,
" whether laden on owners or transient account, and
" an allowance of 2 s. 6 d. per day, all the time the
" ship is in port, *Dunkirk* excepted." The former part of these terms are not like the terms for a voyage homeward to the port of her owners; and the latter exception clearly shews, that every other port was a foreign port, in which an extra allowance was to be made, and that *Dunkirk* was in truth the home port, in which this allowance was to cease. The last article of this agreement is, "that these articles are
" to stand for the ship *Susa's* present voyage from
" *Dunkirk* round to *New York*, and back to a port
" in *Europe*, when they shall either be continued or
" altered as the owner or captain may judge convenient. Signed for and in behalf of owners, *J. Du-*
" *baeque, B. Hufsey.*" These passages strongly prove that the real interest resides at *Dunkirk*. From papers in a former cause, the *America*, in which the name of *Coffin* appeared as the claimant, it appeared also that he and *Hufsey* were persons living at *Dunkirk*, and engaged in the South whale fishery. On all these grounds it is submitted that this vessel would be sub-

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ject to condemnation, even as an *American* ship, from her adopted character; but that in reality, she has even more than an adopted *French* character belonging to her, and is, on all these grounds, subject to condemnation.

For the Claimant, *Arnold and Croke* contended— That it was not necessary to advert to the former voyages of this vessel, or to say what would have been the legal effect, if she had been taken in one of them, as it is clear that the former occupation had ceased; that there had been a cessation of above a year, and that there was no reason to suppose she had again resumed that trade; that the terms of the ships's articles were different from those on whaling voyages, which generally included some proportion of the success of the adventure, and that no fishing tackle was found on board; neither was there any intimation that she was to touch any where to take in any such articles. It was submitted, that the suspicion drawn from the attempt the ship was making to touch at *Calais*, was fully answered by the necessity she was under of landing the *Dunkirk* pilot, which she had before been prevented from doing by adverse winds. In respect to the papers, invoked from the *America*, it was said that the facts and persons in that case were wholly different; that the claim was given; not for *Mark Coffin*, but for *Sh. Coffin*, although the name of *Mark Coffin* was introduced by some mistake into the cause; that that vessel was taken on her return to *Dunkirk*, and the witnesses swore she belonged to persons at *Dunkirk*.

The Court asking, whether there was any paper to connect the property of the vessel with *Coffin*, since

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1795, a letter was produced from *Mark Coffin* to *J. Hussey*:

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“ Respected brother, *Isarat Hussey*, I have lately heard of thy misfortune of being taken and retaken, and carried to *Liverpool*, and further, that thou intended to sell thy ship, and proceed to *Hamburgh* to pursue the first capture for damages. If thou shouldst go to *Dunkirk*, assist to get the ship *Susa* to *America*; she has been lying there nine months, and cannot sail on account of the strictness of the *French* laws respecting the muster roll. Send her in ballast, or with a loading of salt; but do not take goods of the manufacture of *France*, as the laws of *America* do not admit them to an entry. Perhaps thou may with a passage home in her; if that should be the case, I should be very glad thou wouldst take thy passage in her, and give her some freight if thou can; but as I mentioned above, our laws still continue as to *French* goods.

Mark Coffin,

Nantucket, March 2d, 1799.”

JUDGMENT.

Sir *W. Scott*—This is the case of a ship which was taken under *American* colors, on the 19th July 1799; on a voyage from *Dunkirk* to *St. Ubes*, in ballast; the ship is claimed for Mr. *Mark Coffin*, of *New Bedford*, whose name has, by some means or other, appeared in the Court of Appeal in a transaction very much resembling the present, at least in exterior form and shape. In that case, the name of *Mark Coffin* was used by persons carrying on the whale fishery of *France*, without having any footing in *America*, or any visible thread of connexion with it; but carrying back the produce to *France*, and supplying the

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the manufactures and industry of *France*, without any communication or intercourse whatever with *America*. It did appear to the superior Court, as it always appeared to this Court, that persons carrying on such a trade, were just as much to be considered as incorporated in the commerce of *France*, as if they were native merchants of *France*; and that their property so employed would be justly subject to confiscation, be their personal residence where it might. The other actors of that drama were exactly the same as those that appear in this case; there were the same names of *Coffin*, the *Husseys*, and *Dubaeque* the proprietor. Such a coincidence could hardly happen, unless the same names, in both cases, do in reality belong to the same persons, engaged in similar transactions; at any rate it is an awakening circumstance, which calls upon the vigilance of the Court, to examine minutely into the facts of the case, and into the proofs of property that are brought forward.

In the first place, the ship is *French*-built, first seen at *Dunkirk*, and employed in the South whale fishery; the master represents the former trade "to have begun from *New Bedford*;"—the Counsel have put it on better grounds; yet the utmost to which they can bring the case is, that it had generally been to *France*, but, that that course of trade was now abandoned, though for the first time.

If that were the case, and I was satisfied by the evidence in the cause that the ship was the property of *Mark Coffin*, and of him only, I should hold myself bound to restore; but if on the other hand, it should appear that there are other owners with a joint interest,

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terest; and those persons originally domiciled in *France*, or returning from thence, after having lived so long there, as to lie under a suspicion of being liable from that residence, to be treated as *French* persons; I should hold such a claim fraudulent, inasmuch as the suppression of such names would be a fraudulent suppression, and being so, would justly subject the property in question to condemnation. I allude to the *Mr. Husseys*, whose residence in *France* is at least questionable, and very sufficient to provoke the question, whether they are to be pronounced to have left that country, and to be pure *American* characters; without any strong intermixture of *French* interest adhering to them. If I am satisfied that the claim is incorrect, in leaving out other *French* persons, or these *Mr. Husseys*, (on whom at any rate a strong taint and suspicion of *French* character attaches); with an intent of disguising their interest from the Court, I shall consider it to be my duty to reject such a claim altogether, as not erroneously but fraudulently incorrect. Amongst the papers there is clearance on the affirmation made by *Mark Coffin*, in which he is represented as the owner; but other papers speak of a plurality of owners. The agreement between *Dubaeque* and the master speaks of "the owners and their agents," and when I am given to understand that this master is the brother-in-law of *Mark Coffin*, it appears to be a singular mistake for a person so intimately connected with him, to fall into, and amounts as nearly to a contradiction as any positions can do, that are not standing in direct verbal opposition to each other. The master says, "that *Mark Coffin* is the sole owner;" but here again the

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depositions are more at variance than the papers ; for I find the mate, speaking on the authority of the master, says " that there are other owners besides *Mark Coffin* ; that he has heard and believes that the said master, together with two of his brothers which were on board the said ship, one as a mariner, the other as a passenger, or some one of them, were owners of the said ship at the time she was seized ;" and to the 30th interrogatory, " that the master at the time when this deponent was shipped, declared to this deponent that he the said master, and his said brothers, were the real, true, and only owners of the said ship." These are strong and emphatical words, and taking it to be as held out, that *Coffin* has an interest in her, still they would go a great way to shew, that there are other owners. If I credit this man, and his right apprehension of the matter, I must hold these persons to be the true owners ; and it is to be observed, that the mate has no temptation to misrepresent ; he is in a situation of some confidence, and appears totally disinterested, and gives a testimony, as far as I can judge, free from all imputation ; whilst the deposition of the master bears strong marks of what is called mistake, but what other persons must term a very disingenuous manner of delivering a testimony. There is besides an observation arising on the affirmations of these *Husseys*, that though they come from persons described as *Quakers*, and as such allowed to have their affirmations received in this, and other Christian countries, where that persuasion of men is admitted, yet the same persons are certified by the consul at *Dunkirk*, and by another person, the collector of the customs in *America*, as having

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ing on other occasions taken an oath. It is impossible for me to presume such an inaccuracy in public instruments; and therefore with all the respect that is due to religious tenderness of mind, this variance cannot but raise inferences to their disadvantage. It must be allowed at least, that there is something in this disagreement that calls loudly for explanation; and when I look at the disingenuous account which the master has given of his former voyage, stating it to have commenced from *New Bedford*, though I am satisfied it began from *Dunkirk* and no where else; when I see the same insincere account of the destination of the present voyage, not only in the clearance, but in the deposition of the witnesses, stating it to be "direct for *New York*," as if there was no real design of visiting *St. Ubes*, it is impossible for me, so left to pick the truth out, from people who will not tell it themselves, to do otherwise than draw inferences strongly to their disadvantage.

If the Court was to attend merely to the balance of credit, it would be bound to give credit to the mate, when he says that the master told him, "he and his brothers were the sole owners;" it is impossible for me to find a solution for it in mere misapprehension; it could not but be understood in the terms in which it was delivered. There is, besides, something in the agreement that points strongly to an interest in these *Frenchmen*: If the *Husseys*, who are the brothers of *Coffin*, had the direction of the vessel, and she was actually quitting *Dunkirk*, how comes it, that Mr. *Dubaeque* is entering into an agreement with the master "for the owners and their agents." It has been made to appear by a let-

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ter that has been produced late in the cause, that *Y. Hussey* had the care of the ship committed to him by *Mr. Coffin*; but how does this agree with the appointment from the hands of these *French* merchants? How happened it, that *they* should regulate the whole transaction after that; and that *they* should assume the power of settling every thing respecting the concerns of the ship,—and most manifestly, providing for her return to *Europe*? All interference on the part of *Mark Coffin* is entirely excluded, and the whole matter is to be settled between the master and these *French* merchants in *Europe*.

Upon the whole I cannot help saying, that these are great difficulties; and although it is said, that *Mr. Mark Coffin* does not appear to have been implicated in this part of the transaction; and though it is possible, that they may have been thrown on the case, by the manner in which the party's agents in *Europe* have conducted themselves, and that they might have admitted of explanations, if the whole truth had been ingenuously set forth; still as the matter is now represented, it is loaded with difficulties. The ship is claimed for *Mr. Mark Coffin*, as the sole proprietor, although the evidence of the case strongly shews, that there are *French* interests behind, which are not sufficiently disclosed; I have already said what the consequence of that would be: if the parties are dissatisfied with my judgment, they must take the opinion of a superior Court, if they think they can make out a more consistent history: but, on the evidence by which I am to determine this case, I think myself warranted to condemn this ship.

(Instance Court.)

ROBINETT against THE SHIP EXETER.

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THIS was a case of a suit for wages, &c. against the ship *Exeter*, on behalf of *Robert Robinett*, who had been hired as mate in the service of the ship in *Bombay* by the captain, and was afterwards, in prosecution of the voyage to *Europe*, forcibly discharged by him, from the service of the said ship, at the island of *Columbo*; on a charge of incapacity, drunkenness, neglect, and disobedience of orders. The demand was for 127*l.* as the balance of wages and expences incurred in returning to *Europe*.

Suit of mate for wages: Defence, that he had been discharged for misconduct: Sufficiency of defence not allowed, on proof of facts: Wages decreed, &c.

JUDGMENT.

Sir *W. Scott*—This is a suit brought by an officer of a ship, in the *East India* service, for his wages; and it has been observed in the defence, that in this respect, officers do not come before the Court with so strong a title to the indulgence and favourable attention of the Court, as common mariners; who are, from their ignorance and helpless state, placed in a peculiar manner under the tender protection of the Court. But there are other grounds, on which officers are justly objects of equal attention, inasmuch as an injury done to their character is of wider extent, and is attended with consequences of a more serious

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serious nature; mariners, if distressed in one service, may easily obtain another, and a sailor may remain a sailor to the end of his days, as it is not usual to be minute in the enquiry made into their characters. But if an officer is discharged for insufficiency, it may not be easy for him to procure another situation; and he is in danger of losing, not only his present footing, but more particularly those prospects of promotion, which depend in a great measure on the character, that has travelled along with him during his former employs, and has been the most valuable fruit of a life of service. These considerations are sufficient to place officers also under the particular protection of the Court; at the same time this must not be so understood in either case, as if the Court would shew such a blind indulgence, as should over-rule the real justice of the case; it is only such an indulgence as the equitable considerations of public utility require, which can seldom in such cases, any more than in others, be separated from particular justice.

In this case the officer was hired in *Bombay*, to proceed in the service of the ship to *London*; there is no difference about the agreement or terms of service; but it is alleged in the defence against this demand, that the service was not performed; on the other side it is said, that he was at all times ready to discharge his services till he was forcibly removed, which is to be considered in law as equivalent to the discharge; and on the part of the master, this act of removal is justified.

The question before the Court will be then, to decide whether the charges are of a sufficient nature to support this refusal, and whether they are supported by

by sufficient evidence. In the first place I observe there is no general incapacity set up; such a charge is introduced into the deposition of Captain *Whitford*, indeed, but it makes no part of the plea. If a general incapacity had been specially pleaded, and properly supported by the depositions of the master; this Court would find a difficulty in opposing the presumption, arising from the opinion of a superior officer. If that had been pleaded in the allegation, it must have been strong evidence, that would have induced the Court to determine against such a testimony. But if that had been pleaded, Mr. *Robinett* would have had an opportunity of defending himself; and he might have called forward the judgment of the former master with whom he sailed, and by whom he was recommended to Captain *Whitford*, as well as that of others who were acquainted with his talents; as that has not been done; as this charge of general incapacity has not been put in issue in any manner, and consequently Mr. *Robinett* has had no notice to defend himself against it, I must leave it entirely out of consideration, and confine myself to the specific articles, charging him with drunkenness, neglect of duty, and disobedience. These are certainly offences of a high nature, fully sufficient to justify the discharge, if proved. In respect to the negligence, it would not be necessary to prove, that it was wilful negligence; it would be sufficient if it appeared to amount to that habitual inattention to the ordinary duties of his station that might expose the ship to danger; for the person in *Robinett's* station stipulates against such negligence.

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Upon the matter of drunkenness, the Court will be no apologist for that ; it is an offence peculiarly noxious on board a ship, where the sober and vigilant attention of every man, and particularly of officers, is required. At the same time the Court cannot entirely forget, that in a mode of life peculiarly exposed to severe peril and exertion, and therefore admitting in seasons of repose something of indulgence and refreshment ; that indulgence and refreshment is naturally enough sought by such persons in grosser pleasures of that kind ; and therefore that the proof of a single act of intemperance, committed in port, is no conclusive proof of disability for general maritime employment. Another rule would, I fear, disable many very useful men for the maritime service of their country.

As to disobedience to lawful command, it is an offence of the grossest kind ; the Court would be particularly attentive to preserve that subordination and discipline on board of ship which is so indispensably necessary for the preservation of the whole service, and of every person concerned in it. It would not, therefore, be a peremptory or harsh tone, or an overcharged manner in the exercise of authority, that will be ever held by this Court to justify resistance. It will not be sufficient that there has been a want of that personal attention and civility which usually takes place on other occasions, and might be wished, generally, to attend the exercise of authority. The nature of the service requires, that those persons who engage in it should accommodate themselves to the circumstances attending it ; and those circumstances are, not unfrequently, urgent, and create strong sensations,

tions, which naturally find their way in strong expressions and violent demeanor. The persons subject to this species of authority are not to be captious, or to take exception to a neglect of formal and ceremonious observances of behaviour; and on these grounds the Court would hold, that the charges of this defence are *of a nature* sufficient to justify dismissal, if they are properly substantiated in evidence; although it might at the same time be proved that less personal civility had been used, than would excuse something of an hesitation of obedience, in other modes of life.

The next question will be, what is the evidence; and on this point, it is unfortunate that Mr. *Whitford* is the only witness examined on the part of the defence. At the utmost Mr. *Whitford* can only have become competent to give evidence in this case, by having become a bankrupt; and he may have exposed the property of his owners to danger, by not having taken the precaution to do, what ought always to be done, in a matter so tender as the discharge of an officer,—to call the attention of the passengers and crew to the circumstances attending it, that the propriety of the act may be properly warranted, and vouched by as much evidence as possible. This not having been done, Captain *Whitford* is the only witness on that side; at any rate it must appear, that he would have an interest to defend the propriety of his own conduct; if unopposed, the Court would be inclined to presume in favour of authority, such being its proper and legal inclination; but opposed as he is, in this case, by two witnesses, who are not affected by any interest, or otherwise liable to objection, it would be difficult to take his single evidence in opposition to their united testimony. But
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the matter does not rest on the credibility of these witnesses ; an objection has been taken to the competency of Captain *Whitford* ; and although I permitted his evidence to be read, *de bene esse*, reserving the objection, it was not from any doubt entertained, but because I wished to give it farther consideration. The objection taken, is to the conclusion drawn from the 13th and 14th articles of the allegation on the part of the defence which plead—

“ 13th, That the said ship *Exeter*, together with
“ her tackle, apparel, and furniture, hath, since her
“ arrival in the port of *London*, from her aforesaid
“ voyage, been sold by the decree of this Court to
“ discharge the claims of the officers and mariners
“ belonging to her for their service on board the
“ said ship during the aforesaid voyage ; that after
“ payment of the just and legal claims of the said
“ officers and mariners, there will remain about the
“ sum of 4000 *l.* as the balance of the proceeds,
“ That there were just and legal claims of bottomree
“ and other bond-holders on the said proceeds to
“ the amount of 6000 *l.* and upwards, and on whose
“ behalf such proceeds have been arrested. That
“ two of the said bonds, amounting respectively to
“ the sum of 1,250 *l.* and upwards, including interest,
“ were given by the said Captain *Whitford* upon the
“ bottom of the said ship, as a security for money
“ advanced at the *Cape of Good Hope*, in the prosecution of her aforesaid voyage, and are entitled to
“ a priority of payment to the other of the said
“ bonds, which were given as a security for money
“ previously advanced at *Bombay*, and have been so
“ paid accordingly. That by payment thereof the
“ balance of the said proceeds hath been reduced to
“ about

“ about the sum of 1,500 *l.* being all that will remain for the discharge of the said last mentioned bonds, which amount together including interest to the sum of 3,500 *l.* or thereabouts.”

“ 14th, That the said *Richard Whitford*, late commander and two-thirds owner of the said ship *Exeter*, hath, since the arrival of the said ship in the port of *London*, been declared under the great seal of *Great Britain* a bankrupt; and having conformed himself in all respects to the several acts of parliament relating to bankrupts, on or about the 20th day of *October* last past, duly obtained his certificate, under the aforesaid seal, and was and is thereby exonerated from all claims and demands whatever, which arose prior to the date of the said certificate. That by reason of the premises, *he*, the said *Richard Whitford*, was and is a legal and competent witness to be produced, sworn, and examined in this cause.”

Personally exonerated he certainly is, but not exonerated as to the estate, about which he is still liable to be examined. He has an interest still remaining as to the surplus of the estate, and also as to the allowance which will depend on the payment that is made; till he has done more, therefore, than he has yet done; till he has released all interest under the estate, and also the allowance; I have no doubt, upon the consideration which I have been able to give the matter, and also on conversation with eminent persons at the common law, that he is not a competent witness. Unless the defence, therefore, can be sustained on Mr. *Robinet*'s own witnesses, there is an end of this suit.—How do they depose?

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As to his general conduct, Mr. *Urquhart*, who was one of the officers of the ship, says, "That during all the time the said *Robert Robinett* continued on board the ship, saving the time he was confined in his cabin, as herein-before set forth, he did well and truly perform his duty as second mate, and was obedient to all the lawful commands of the said *Richard Whitford* the master and other his superior officers on board;" and the second witness speaks in the same terms, and adds, "that he appeared always ready and willing to perform his duty." As to the charge of drunkenness, the first witness says, "he never saw any thing of the kind;" and the second witness, "that he never saw him in liquor but on one occasion, on *Christmas-day*, whilst the ship was lying at *Bombay*:" this single instance is not, I think, sufficient to support the charge. I must observe too, that this witness *Eshington*, was the steward of the ship, and that it was part of the interrogatory addressed to him, "whether *Robinett* was not importunate to him for liquor; and whether he did not complain to Captain *Whitford*, that the said *Robinett* was always applying to him for an extraordinary quantity of wine and spirituous liquors;" to all which he answers in the direct negative, and says, "that he never did apply to him for more wine and other liquors than other officers were usually supplied with; and that he the respondent never did make any complaint to Captain *Whitford* on that score;" then, how is it possible to support this charge?

Next, as to negligence, it is not immaterial to observe, that in the note of dismissal from Capt. *Whitford*, the only act of negligence specified, is the omitting

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ting to take in the yawl, and by that means suffering some *Lastar* sailors to desert; this was all that was specified, and it does rather induce a belief that this was all that was taken notice of at the time, and that the rest has been called in aid, as subsidiary matter, to make out the charge: Then what are the acts of negligence? The first instance of neglect is charged in these words, "That whilst the said ship *Exeter* was off the gulph of *Manora*, in the prosecution of her voyage from *Bombay* to *Colombo*, the said *Robert Robinett*, who was the officer upon watch, notwithstanding it was obvious a squall was arising, neglected to take in her sails, as was his duty to have done, but suffered her to proceed in full sail; that upon Capt. *Whitford* coming on deck, he expressed great displeasure towards the said *Robert Robinett*, for such his negligence, and said to him, if he were ignorant of his duty himself, he might have seen what was necessary for him to do by the ship *Nottingham*, which was sailing in company with the said ship, and had then taken in all her sails; that notwithstanding every exertion was then used by the order of the said Capt. *Whitford* to take in the said sails, the topsails had been (owing to such the negligence of the said *Robert Robinett*) nearly carried away by the squall coming on before they could be lowered." On this article Mr. *Eslington* says that he cannot speak, not being a judge of nautical matters, and having been, besides, below during the time enquired of; and Mr. *Urquhart*, though he confirms the fact, except as to the danger of the topsails being carried away, says,

I

" That

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“ That he did not consider Mr. *Robinett* to have
 “ been guilty of any acts of negligence in the course
 “ of the voyage, or to have betrayed any want of
 “ nautical skill.” This is all that is said ; and I need
 not add that it is impossible for me to pronounce
 that the charge of neglect in this article is sustained
 on such evidence. The next charge is of losing the
 boat, and suffering five *Lascaars* sailors to desert. It is
 charged in the allegation, “ That the said *Robert*
 “ *Robinett*, whilst he was in charge of the said ship
 “ *Exeter*, as the superior officer on board, when she
 “ lay at *Colombo*, on or about the 13th day of *Febru-*
 “ *ary* 1797, left her long boat at the buoy of an
 “ anchor parted with some days before, together
 “ with five *Lascaars* belonging to the said ship, in her ;
 “ that at day-light the next morning it was disco-
 “ vered, that the said five *Lascaars* had deserted with
 “ the said long-boat, a hawser, and three large
 “ tackles ; that it was five or six days before the said
 “ long-boat was again found, when she was found at
 “ *Point de Galle*, much damaged, and the hawser
 “ and tackles had been taken out of her, and were
 “ totally lost ; that the said *Lascaars* were never after-
 “ wards discovered, nor did they, or either of them,
 “ ever return to their duty on board the said ship.”
 On this article the witness *Urquhart* says, “ That
 “ although Capt. *Whitford* did blame the producent
 “ for leaving the long-boat in charge of the *Lascaars*,
 “ that he never heard any other officer on board im-
 “ pute blame to the producent *Robinett* on that ac-
 “ count, neither did he consider him to be blame-
 “ able ;” and the second witness says, “ That the

“ said *Robinett* was not considered as grossly negligent in losing the long boat by the deponent, “ it not being his duty to be on board at that time.” I cannot say that the fact of imprudent conduct, or of negligent conduct, is in any way fastened down on him in this instance.

The next charge is that “ whilst the said *Robinett* “ was in charge of the ship as superior officer on “ board in *Colombo Bay*, he one night neglected to “ have the yawl hoisted in, as it was his duty to have “ done, by which means seven other *Lascar* sailors “ went on shore, and deserted.” To this the witnesses say, “ that although it might have been proper “ to hoist in the yawl at night, as it is usually done, “ that it is not an invariable rule.”

The next instance of neglect is, “ That the said “ *Robert Robinett*, whilst he was in charge of the “ said ship *Exeter*, as the superior officer on board, “ as she lay at *Colombo*, on or about the 14th day of “ the said month of *February* 1797, let go a second “ anchor; that Capt. *Whitford*, the commander, “ when he came on board the said ship on that day, “ observed that the same crossed the cable, by which “ the said ship was originally riding, and ordered the “ said anchor to be immediately weighed; that the “ said cable upon its coming in, was found so much “ chafed from want of proper service on it, as to “ render it absolutely necessary to cut it off, about “ ten fathom from the clinch; that it was the duty “ of the said *Robert Robinett*, as the officer in charge, “ to have seen that proper service had been put on “ the said cable, and that he was guilty of a gross “ act

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“ act of negligence on such occasion, and thereby
 “ greatly endangered the safety of the said ship, and
 “ the property of the owners; that if the said ship
 “ had sustained any damage by the breaking of the
 “ said cable, arising from its being chafed as afore-
 “ said, the underwriters would have been exonerated
 “ from payment thereof under the policy of in-
 “ surance.” The only witness that speaks to this
 article is *Urquhart*, and the account which he gives
 is very material. He says, “ That it was the duty
 “ of *Robinett*, as the officer in charge, to see that
 “ proper service was put on the cable, which he
 “ believes was done at first; but as the producent
 “ *Robinett* was then the only officer on board except
 “ the chief mate who was confined by the captain,
 “ and this respondent who was ill, it was impossible
 “ for him to pay constant attention to the cable,
 “ and the accident of the chafing was owing to the
 “ inattention of the black gunner who was in charge
 “ thereof, whilst the producent went to sleep.” Ad-
 verting, as I must always do, to the circumstance of
 Mr. *Robinett* being the only officer on board, and to
 the surplus duty that he had to perform in conse-
 quence of being so; and finding that the black gunner
 was on that account appointed to assist him, and that
 the chief imputation thrown on him was, that he
 did not see that the black gunner did his duty whilst
 he went to rest, it is impossible to say that this per-
 son is affected with the charge of negligence on this
 account.

I come next to the charge of disobedience, which
 I have said is of a very malignant nature in the eye
 of

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of the Court; and which the Court would upon every consideration be disposed to discountenance. But the only command upon him, that I see which was disobeyed, was an order to leave the ship: and although I do not say, that a master has not a right to give a discharge, and if the person so discharged refuses to quit the ship, that he might not turn him out, being responsible for his conduct in so doing; yet this must always be understood to be subject to responsibility on the question of the propriety of the discharge; because it could never be maintained in the *English* maritime service, that if a master chose to turn a mariner on shore, without cause, in a foreign country, the mere refusal to go would of itself justify an improper discharge. The propriety of the refusal in such a case must depend entirely on the propriety of the order, and that must depend almost entirely upon its necessity, for little less than absolute necessity is required to bear out such an order. That a person should be a little averse to be turned ashore on this remote island, which though in *English* possession, is in truth a *Dutch* settlement, cannot be matter of surprize: it is easy to say, that it was his duty to obey, and fight his way home, and seek redress from a court of justice here; but that the person should feel a little unwilling to be turned adrift, in this remote and foreign settlement, is not to be wondered at; and I cannot think his expressing a disinclination can be considered to constitute an offence of mutiny or positive disobedience.

On the whole I am of opinion, that the evidence of Captain *Whitford* is not admissible, and that on the evidence of the other witnesses I am in no degree

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warranted to say that the charges set up as the defence to this suit are made out. I must, therefore, pronounce for the demand of wages, and the expences which have been incurred in the course of this suit to recover them.

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THE CAPE OF GOOD HOPE and its Dependencies.

Claim of joint capture, by *East India* ships carrying troops to the *Cape of Good Hope*, and asserting to have contributed to the capture, by intimidation occasioned by their appearance, not allowed: Nature of the *association* by which transports can entitle themselves, as joint captors.

THIS was a case of an allegation given on the part of the Admiralty, claiming an interest in the capture of the *Cape of Good Hope*, in virtue of several non-commissioned *East India* ships, asserted to have assisted in that enterprize.

In support of the allegation, the Advocate of the Admiralty and Laurence—It is scarcely necessary to call the attention of the Court on this question to any other evidence than the letter (a) of Lord Keith, written *in recenti facto*, which acknowledges in the

(a) "To the officers and seamen of the honourable company's ships in *Symons Bay*.

"However unnecessary it may appear to true *Britons* to thank them for services rendered to their country, yet the particular situation of the Admiral must excuse his doing so, because he feels himself personally obliged by the ready attention of the officers and seamen of the *India* ships, in assisting their brethren so essentially, as greatly to contribute towards the fortunate event of the reduction of this valuable colony.

"*Monarch, Symons Bay, 16th Sept. 1795.*"

fullest

fullest terms the services of these ships, and the great assistance they afforded towards the reduction of the colony. The terms of this letter are so strong, and go so directly to support the substance of the demand, resulting from the actual assistance afforded by these ships, that it is hardly necessary to detail more at large the nature of the services, and the particular advantages that were derived from them. The immediate effect of their assistance will be found, however, stated more particularly in the letter written from General *Craig*, in these terms: "On the one hand as the enemy appears numerous, and disposed to an obstinate defence, for which they had ample time to make the best preparations, I could not but be sensible that the force under my command was, in point of numbers, inadequate to the attempt of reducing them." And again, "In a conference with Sir *G. Elphinstone*, on the 2d of *Sept.* it was agreed to wait six days longer for the possibility of the arrival of General *Clarke*, and that if he did not appear by that time, I should then advance under every disadvantage of numbers and situation, try the fortune of an attack, which however hazardous, we deemed it our duty to make, before the total failure of our provisions put us under the necessity of seeking a supply elsewhere. On the morning of the third, however, the enemy encouraged by the little success which had attended our attempt on the first, meditated a general attack on our camp, which, in all probability, would have been decisive of the fate of the colony. They advanced in the night with all the strength they could muster, and with a train of not less than eighteen field pieces; some movements which had been ob-

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served the preceding evening had given me a suspicion of their intention, and we were perfectly prepared to receive them. They were on their march, and considerable bodies began to make their appearance within our view, when at that critical moment the signal for a fleet first disconcerted them, and the appearance of fourteen sail of large vessels, which came in sight immediately after, induced them to relinquish their enterprize, and retire to their former posts." It is still farther material to observe that the effect of this arrival was not matter of accident merely; the ships sailed from *St. Salvador*, on this particular enterprize, in consequence of the immediate application of General *Craig*, sent from the *Cape* to *St. Salvador*, on the coast of *Brazil*, for the express purpose of hastening the arrival, as he did not think it prudent to begin the attack, on the settlement of the *Cape*, till he was reinforced. These facts, being established beyond contradiction, by the acts of the commanding officer, do, it is submitted, amount to that proof, which in ordinary cases of claims on the part of non-commissioned ships, is required of them to make out their case. The *onus probandi* being taken off from them, and the facts being supplied by the *captors*, it becomes a case not merely of constructive service, but of *actual assistance*, and the only question is, how far it will *in law* entitle them to share. By analogy to former cases, it comes within a recognized principle; for this Court has gone so far as to allow non-commissioned ships to share in cases of *actual assistance*. In the case of the *Twee Gefusters*, *Cooman*, in the last war, the act of joint chasing was allowed to amount to this assistance, although the non-commissioned ship did not come up till after the capture

capture had been effected. In the case of the *Le Franc* * also, the non-commissioned ship was allowed to share; and therefore the principle of law being admitted, that associated actual services are of a competent nature without a personal interposition in the act of capture; it can hardly be denied that the acts of assistance rendered in this case are sufficient to entitle the parties to the application of it. It is admitted that one of the ships, the *Bombay Castle*, is entitled to share, as having been detached on a particular service, to make a diversion on the side of *Table Bay*. But it will be difficult to make this admission, without allowing the whole claim, because it was only by means of a draft from each of the other ships, of twenty men, by order of Lord *Keith*, that this ship was enabled to act; and the manner of making this draft goes strongly to shew the character in which these ships were received; for it was made not in the manner of volunteering merely, but under an order from Lord *Keith*, directed to Capt. *Rees*, the commanding officer of the *East India* company's ships, to supply the necessary men. It had been before intimated from Lord *Keith*, that all orders to the crews of the *East India* company's ships should be directed to him: he was admitted to the Council. The ships were particularly directed to wear pennants, which is in itself, according to the opinion of a distinguished naval Officer, an acknowledged mark of an adoption into the military character; and the whole mode of intercourse at the time, shews, that they were considered in the nature of a combined force.

That non-commissioned ships are capable of being considered in the light of an associated force, is clear

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* Vid. infra,
p. 285.

Vid. infra,
p. 288.

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from the precedents that have been cited ; all the intimidation that can in any case be derived from an associated force, was produced in this instance ; it was the cause that induced the enemy to relinquish their hopes of defence ; it was materially instrumental to the surrender that took place ; and therefore the Admiralty is, by virtue of the services of these ships, entitled to share in this prize.

Against the allegation, the King's Advocate and Arnold—The capture is admitted to have been made by a conjoint force, under the special instructions of his Majesty ; therefore, if a claim was set up to partake in this capture, on the part of private ships of war, *actually commissioned against the Dutch*, it would be incumbent on them, to make out a case of active co-operation and assistance : This, it is apprehended, was fully settled, in a case much agitated in another place, the case of the capture of *Negapatam* by Sir *Edward Hughes* ; in which a similar question was discussed, whether the ships claiming to share, were, under the circumstances of that case, to be considered in a military character, or as transports ? It was then fully established, that ships in the character of transports *cannot* share. But it is said that this case stands on different grounds, on an associated military character, and intimidation produced on the enemy : the association is by no means proved it rests upon the claimants to make that clear ; and as to intimidation, it was only in the character of transports, that the ships in question could possibly produce any intimidation—as ships of war, they were useless. There were, at that time, six or seven men of war, as many as could be used,
lying

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lying in *Symons Bay*, under the command of Lord *Keith*. In what way could they then produce intimidation, as ships armed and appointed as ships of war? The *Dutch* were lying at some distance, between *Symons Bay* and *Cape Town*. General *Craig*'s letter to Lord *Keith* states, "that he was in a critical situation, and disposed to wait six or seven days longer;"—not for ships, because Lord *Keith* was there in force, with a sufficient number of ships of war, but for troops in ships acting as transports. The intimidation, therefore, is out of the question, as to their military character. But it is said they were treated in that character, from the moment of their arrival; that having hauled down their pennants, they were desired to hoist them again. As far as respect and honourable treatment is concerned, that might be a distinction; but as a mark of character, that circumstance is wholly immaterial, and equivocal; and, to all legal effects, they remain transports still. It is said that they received all orders through their commodore, Captain *Rees*; but even in this respect, the orders are not issued in the same form as to ships of war; for it is stated by Captain *Rees*, "that exclusive of a number of men sent with the *Bombay Castle*, he did, in pursuance of an address received from Lord *Keith*, which he desired to be circulated through the fleet, for the purpose of procuring volunteers, procure twenty men from each ship, amounting to 240 men, &c." This is not like the order issued to men of war:—But much reliance is placed on Lord *Keith*'s letter; and it is said, that the thanks are addressed, not only to the volunteers, but to all the fleet generally. If this letter stood alone, unexplained, and receiving no construction from the facts be-

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fore the Court, it might lead to an inference, that all the ships were equally entitled; but this is only a general expression of thanks in the hour of triumph, and cannot controul the particular evidence in the case, on the points pleaded in the allegation. Lord *Keith* had no power to give an interest, beyond what the facts pleaded can sustain. In cases of non-commissioned vessels, no claim of mere constructive assistance can be admitted; no active co-operation, in any degree, bearing upon the capture in question, can result from the facts pleaded in this allegation; and therefore it is hoped the Court will reject this claim at once, by not admitting the allegation to go to proof.

JUDGMENT.

Sir *W. Scott*—This question arises on the claim of certain *East India* ships, or rather of the Admiralty on their behalf, to share in the capture made at the *Cape of Good Hope*. It appears by reference to the gazettes, and in the allegation, and in all the evidence, as far as it is necessary for me to state it, that these ships were employed to carry a number of troops to the *Cape of Good Hope*. The greatest part of the naval operations, necessary for the reduction of that colony, had been performed, before the arrival of these ships; and there appears to have been only one particular piece of military service performed on the part of the navy after their arrival, and on which only one of these ships was employed: that vessel will undoubtedly be allowed to share; as to the rest, although it must be admitted, on all sides, that the *East India* Company have performed services, in respect to this expedition, which may entitle them to the thanks of their country; yet the question of
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legal merit, whether they will be entitled to share in the proceeds of this prize, will depend on very different considerations,

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It is not stated in what way the agreement was made with these ships, whether it was to act in a military capacity or not; if it was to act in a military character, that might nearly decide the question. But nothing is said on this subject in the plea, and therefore I must infer, that no such ground of pretension could be sustained. All that is said is "that they carried out General *Clarke* and his troops." It is perfectly clear, that at the time of leaving the coasts of *Brasil*, it was perfectly unknown to these ships for what attack these troops were conveying:—Whether, by virtue of their contract, they were to stay at any place, or come away after the troops were landed at such place, is wrapped in complete silence; and therefore, for want of any more particular description, I can look only to their general character, which is that of merchant vessels, commissioned against the *French*, but having no commission against that enemy who was the particular object of this expedition; whatever their force may have been, I do not see that they can be considered, in their original character, as more than transport vessels, liable to be called upon occasionally to act, with alacrity and vigor; (for *British* vessels, of any character, are liable to be so called upon on extraordinary occasions of public necessity;) but not deriving from that circumstance, as far as this expedition was concerned, any title to invest them with a military character; for the mere conveyance of troops would have no such effect. At the same time, it is true, that a military

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character might be afterwards impressed upon them; by the nature and course of their subsequent employment. If they have been associated to act, in conjunction with the King's fleet, and did so act, they may acquire an interest, which, on proper application, will be sure to meet with due attention. The question, for me to consider, then will be, whether they have acquired that military character or not? Their pretensions have been put on several grounds; it is first said, that they were associated with the fleet; mere association will not do, the plea must go farther, and shew in what capacity they were associated, and that capacity must be directly military. Transports are associated with fleets and armies for various purposes, connected with, or subservient to the military uses of those fleets and armies. But if they are transports merely, and as such are employed simply in the transportation of stores or men, they do not rise above their proper mercantile character in consequence of such an employment; the employment must be that of an immediate application to the purposes of direct military operations, in which they are to take a part.

It is next placed, on the ground of intimidation; and it is said, that when the enemy is *proved* to have been intimidated, where it is not matter of inference, but of *actual proof*; the assistance arising from intimidation is not to be considered as constructive merely, but an actual and effective co-operation. But I take that not to be quite correct; for an hundred instances might be mentioned in which actual intimidation might be produced, without any co-operation having been given. Suppose the case of a small frigate, going to attack an
enemy's

enemy's vessel, and four or five large merchant ships, unconscious of the transaction, should appear in sight; they might be objects of terror to the enemy, but no one would say, that such a terror would entitle them to share; though the fact of terror was ever so strongly proved, there would not be that co-operation, nor that active assistance which the law requires, to entitle non-commissioned vessels to be considered as joint captors. What is the intimidation alleged?—"That the *Dutch* forces were about to make an attack on the *British* army, but on the appearance of these fourteen ships, desisted." This was an intimidation, of which the ships were totally unconscious; and which would have been just as effectually produced by a fleet of mere transports; and I see no principle on which I could pronounce these ships entitled, on which I should not be also obliged to pronounce any fleet of merchantmen entitled in a similar situation; for any number of large ships, known to be *British*, and not known to be merchantmen, would have produced the same effect. The intimidation was entirely passive, there was no *animus* nor design on their part, nor even knowledge of the fact; for it was not till the next day, when their commodore returned from Lord *Keith*, that they knew any thing of the matter, or ever thought of the terror that they had assisted in exciting. I take it to be uncontrovertibly true, that no case can be alleged in which a terror so excited, has been held to enure to the benefit of a non-commissioned vessel. Another ground on which it is put, and which it may be proper for me to advert to, is the ground of analogy. That it is a case of assistance, analogous to that of joint chasing, on which it is said to be sufficient, if the non-com-

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missioned ship puts itself in motion: and the cases of the *Twee Gefuster* (a) in the last war, and the *Le Franc*,

(a) This was a case of a *Dutch* ship, taken 31st Dec. 1780.

The circumstances of the case were, that on the morning of the 31st, the prize in question, of 300 tons and 16 men, was discovered by two armed cutters, the *Providence* and *Spitfire*, each manned with 16 men, (the *Providence* being commissioned, and the *Spitfire* not commissioned, against the *Dutch*), when they immediately chased; the *Providence* first reached the prize; the *Spitfire* being then distant about one *English* mile, soon afterwards came up, and immediately afterwards the prize was seized by the *Providence* and the *Spitfire*; her prisoners and papers secured, some in the *Providence*, and some in the *Spitfire*; and the master of the *Spitfire* was put on board the prize, with several men, and the *Providence* left the prize with the *Spitfire* to convey her to *Dartmouth*.

These facts were acknowledged, and the *Spitfire* was allowed to have been a joint chaser by the *Providence*.

The sentence of the Judge of the High Court of Admiralty, 21st June 1783, pronounced the *Providence* to be the captor, but that the *Spitfire* was aiding and abetting; and decreed the *Spitfire* to take half the share she would have been entitled to, had she had a commission against the *Dutch*.

This part of the sentence being appealed from, on the part of the *Providence*, the Proctor of the Admiralty intervened, 15th Feb. 1785, and prayed, that such part of the prize as the *Spitfire* would have been entitled to, if commissioned, might be condemned as a droit of Admiralty.

On the 8th of March 1785, the Lords of Appeal pronounced for the interest of the King, in his office of Admiral; and that such proportion of the prize as would have belonged to the *Spitfire*, if commissioned, was liable to confiscation as a droit and perquisite of Admiralty, and condemned the prize "as taken by the private ship of war the *Providence*, and the non-commissioned ship the *Spitfire*;" and directed the same to be shared in proportion accordingly.—
Present,

Lord Camden,
Lord Grantly,
Sir Joseph Yorke,
Sir Lloyd Kenyon, Master of the Rolls.

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Franc (b), have been relied upon.—I see no ground on which the analogy can be supported: the cases cited

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A circumstance not unworthy of notice in this case, though not affecting the judgment, was, that it was stated on the part of the *Spitfire*, "that on the commencement of hostilities against the *Dutch*, the owners of the *Spitfire* fitted her out as a private ship of war, sent her on a cruise against his Majesty's enemies, and applied for letters of marque; that the Commissioners of the Admiralty granted a warrant to the Judge of the Admiralty to issue letters of marque and general reprisal against the *Dutch*, to *Tessier* the master of the *Spitfire*, on the 29th of *December* 1780; but by reason of the then great flood of business in the Admiralty Court, the letters of marque could not be obtained under seal, till the first day of *January* 1781, and that this capture was made on the 31st *Dec.*"

This was stated among other points, in the *présentim* of appeal: but the claim of the non-commissioned captor was not allowed.—From which it appears, that the endeavours of the party to obtain his commission, aided even by the warrant of the Lords of the Admiralty for its passing, will not be sufficient to vest any interest on intermediate captures, till the commission is actually issued.

(b) The *Le Franc*, *Caspé* master.

This was a *French East India* ship taken by several vessels, composing part of a *British East India* fleet, 24th *June* 1793.

Of the ships in question, the *Glatton*, Capt. *Drummond*, had not taken out a letter of marque; the others were commissioned as private ships of war.

On the part of the *Glatton* an appearance was given, praying a decision on the interests on the question of law. The facts being admitted on all sides, "that she was not a commissioned ship, and that she was materially instrumental to the capture," the Proctor of the Admiralty appeared for the King in his office of Admiralty, praying that such proportion of the prize in question as would have been condemned to the *Glatton*, if she had been a commissioned ship, might be pronounced liable to confiscation to the King in his office of Admiralty, as a droit and perquisite of Admiralty.

The sentence of the High Court of Admiralty condemned the prize, as taken by six private ships of war, and the *Glatton*, but
condemned

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cited were of a very different nature; in both of them the non-commissioned ships chased *animo capiendi*,

condemned the *Glatton's* share as a droit and perquisite of Admiralty.

The facts, as to the situation and merits of the *Glatton*, are thus represented in the words of the certificate of the commanders of the six private ships of war, presented to the Lords of the Admiralty, annexed to the memorial on the part of the *Glatton*, praying to be rewarded.

"We, the subscribed commanders of the six duly commissioned private ships of war, which with the non-commissioned ship *Glatton*, *Charles Drummond* commander, captured the French prize *Le Franc*, do hereby certify, that at day-light on the 24th of June 1793, the *Glatton* was from 10 to 15 miles to windward of our ships, and at the same time the prize was upon the *Glatton's* weather quarter, distant about three miles steering to the northward; Capt. *Drummond* thereupon (supposing her to be an enemy) kept the wind until he found the *Glatton* could weather her, and then wore, and chased the prize until she was brought to by the *Ceres* and some of the other ships: And we do further certify, that had the *Glatton* not been to windward, it would have been impossible for the other ships to have come up with the prize, as when she had discovered the ships to leeward, she might have kept to windward and got off, had she not been prevented by the *Glatton*. Witness our hands, the 25th day of March 1795."

In the same case a claim was given for the *Barwel*, and several other ships of this fleet, stating, "that they sailed as an *associated* and *confederated* fleet, for mutual defence, by particular direction of the *East India* company; that they were all together on the evening of the 23d June 1793; that during the night some of the ships had separated; that on the morning of the 24th about six o'clock, the *Barwel* perceived one of the said ships to the eastward; that the commodore made signal to the *Barwel* to chase; that after chasing three hours, she came completely in sight of the said ships that had separated, and when she came up with them, &c. she found they had taken the prize in question."

The claim on the part of these ships was rejected.

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and contributed materially, in the case of the *Le Franc*, directly and immediately, to the act of capture. In the present case, these ships approached, it is true, the coast of the *Cape of Good Hope*, but with no *animus capiendi*, with no hostile purpose entertained by themselves; for they were totally ignorant of the objects of the expedition. It is, moreover, obvious to remark, that all cases of joint chasing at sea differ so materially from the cases of conjunct operations at land, that they are with great danger of inaccuracy applied to illustrate each other. In joint chasing at sea, there is the overt act of pursuing, by which the design and actual purpose of the party may be ascertained; and much intimidation may be produced: but in cases of conjunct operations at land, it is not the mere intrusion even of a commissioned ship, that would entitle parties to share. The words of the act of parliament direct, "That in all conjunct expeditions of the navy and army, against any fortress upon the land, directed by instructions from his Majesty, the flag and general officers, and commanders, and other officers, seamen, marines, and soldiers, shall have such proportionable interest and property as his Majesty, under his sign manual shall think fit to order and direct." The interest of the prize is given to the fleet and army, and it would not be the mere voluntary interposition of a privateer that would entitle her to share. It would be a very inconvenient doctrine, that private ships of war, by watching an opportunity, and intruding themselves into an expedition, which the public authority had in no degree committed to them, should be at liberty to say, "we *will* co-operate;" and that they

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they should be permitted to derive an interest from such a spontaneous act, to the disadvantage of those to whom the service was originally entrusted. Expeditions of this kind, designed by the immediate authority of the state, belong exclusively to its own instruments, whom it has selected for the purpose; and it might be attended with very grave obstruction to the public service of the country, if private individuals could intrude themselves into such undertakings, uninvited and under colour of their letter of marque. I think, therefore, that the cases of chasing at sea, and of conjunct operations at land, stand on different principles; and that there is little analogy, which can make them clearly applicable to each other. It is next said, that they were directed to hoist pennants; and that it was the opinion of a very high military (a) officer, in a former case, that the permission to wear the pennant did give the character of a king's ship: but the decision, in the very case in which that opinion was offered, (in the capture of *Negapatam*), held, that a ship, which in that case had worn a pennant, was not to be considered in a military character, but as a transport; the mere circumstance therefore, that these ships, which were large ships, and had before carried pennants, and had taken them down only out of respect to the king's ships, and

(a) The Advocate of the Admiralty had said, during the cause, that in the case of *Negapatam*, he had waited on Lord Hood, and had received his Lordship's authority to state it, as his opinion, "That the permission of the admiral of the fleet to merchant vessels to wear pennants, was considered as an act, adopting them into the king's service, for that occasion."

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were desired to hoist them again. I cannot hold to be a sufficient proof, that they were by that act taken and adopted into the military character; I can attribute no such effect to a mere act of civility and condescension.

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In the next place, it is argued, that these ships were actually employed in military service, although there is no such averment in the plea. It comes out in evidence only, (by which I must observe the other party is deprived of the opportunity of counterpleading), that their boats were employed in carrying provisions and military stores on shore: that was a service certainly, but not a service beyond the common extent of transport duty. They landed them, probably at the same time with the troops for whose use they were intended; and if not at the same time, still it is no more than what they were bound to do with the stores and provisions they carried.

It is likewise said, that they received military orders; and if that fact was sufficiently proved, it might be material; but it is observable, that not a single order is pleaded in the allegation, except in respect to the *Bambay Castle*: that vessel, it appears, was sent under military orders to create a diversion; and I think I do not give too much to that ship, when I say, that this circumstance was sufficient to cloath her with a military character, being engaged in a military employment and exposed to danger: but it is argued, that because orders were given to man this ship by detachments from the rest, that it will make the whole fleet entitled to be considered as acting likewise in a military capacity. Taking it upon the argument, that this was done by orders directly from

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from Lord *Keith*, I cannot think, it would have that effect; for in the first place, can it be denied, that a commander in chief might exercise a power of impressing a number of their crews, without giving to those ships any thing of a military character? It is within the power of commanders on maritime expeditions, to press persons of that description to assist in any particular service, in such a case of public emergency. But no such orders are pleaded, nor by any means proved to have been given: The communication was carried on between Lord *Keith* and one particular person, Captain *Rees*, in the same manner as it would have been done, if they had been mere transport-vessels; and the only order mentioned was, that the crew of the *Bombay Castle* should be increased.

The next military orders that are relied on, are those for a draft of twenty men from each ship, for the purpose of drawing the artillery, &c. and I think the same observation would apply to these also; for I have no hesitation in saying, that in a remote expedition like this, the commanders of his Majesty's forces have a right to call into their service, for such purpose, the assistance of *British* mariners; and I hope, and trust, the time will never come, when *British* mariners will think they are called beyond the line of their duty, when they receive an order to that effect. The fact is, that it was done rather by invitation, as a better mode of doing it, and the words of Captain *Rees* deposition describe it, as an address for volunteers, rather than as an exercise of authority and command. These are the whole military services, with the exception of those indefinite

services, on which much argument has been bestowed; I mean those referred to in Lord *Keith's* letter; in which Lord *Keith* acknowledges, that these transports had contributed to the surrender. In the first place, a letter of that kind, written in the moment of victory, should not be too strictly interpreted as conveying any opinion of the writer, on the minute parts of the transaction: Taking it, however, to be as argued, that it *does* shew his sentiments at that moment on the matter; it is by no means conclusive upon the question. It might be erroneous in fact; much less can it be considered as conclusive in point of law—Lord *Keith* is not the only party: on the facts, it is not conclusive against *others*; and on the law, it is not conclusive against himself; for if he should be found to be mistaken, as to the legal effect of such services, who would say that he would be concluded by this admission. However, looking at the letter carefully, I do not see that Lord *Keith* might not have written just in the same manner to a fleet of transports doing their duty with alacrity and zeal, as a general expression of thanks for the performance of those services, in which they had been respectively employed.

Upon the whole of these facts, I feel myself obliged to pronounce, that it has not been shewn that these ships set out in an original military character; or that any military character has been subsequently impressed upon them by the nature and course of their employment; and therefore, however meritorious their services may have been, and however entitled they may be to the gratitude of their country, it will not entitle them to share in this valuable capture.

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THE FRAU MARIA, Jansen Master.

Commission of appraisement and sale is an instrument, in the first instance, taken out by captors: They primarily answerable for the expence, &c.

THIS was a case of a motion for a new commission of appraisement on the part of the claimant, on suggestion that the former commission had not been executed by the Marshall; as he had refused to return the commission, till his expences were paid. It was said, that the commission of appraisement was an instrument taken out by the captors, and therefore that the expences ought to be paid, in the first instance, by them; that the cause of this delay had been unknown to the claimants, that they would have been ready at all times to advance the expences to have prevented the delay, by which the cargo had sustained a deterioration of 40 per cent.

The King's Advocate resisted the motion, saying—That the delay complained of, could not have happened but by the laches of the claimants, who were the persons to look to the due execution of the commission.

Court—It must be allowed, I think, that the parties in this case are, *in pari delicto*: but I am desirous of laying down some rule to prevent the same inconvenience from happening in future. I am of opinion, that the captor is the person who is to make the payment in the first instance. He is the person who puts the commission into the hands of the officer, and

and defrays him to execute it. By whom are the other fees of office paid?

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Registrar—By the captor.

Court—Then what ground is there to pretend there should be any distinction? That the claimant may be ultimately interested, is a matter of future consideration. It may be proper that the captor should be indemnified; but I am of opinion that the captor is answerable in the first instance, and I cannot conceive that the Marshall is bound to look elsewhere. Where it is done for the accommodation of the claimant, that will be a matter to be settled between them: but I shall certainly hold, that the captor is liable for the expences in the first instance, though they may be ultimately, to be divided between both parties. I shall direct a new appraisement in this case; and as the commission is prayed by the claimant in this instance, it must be at his expence—but in future cases it must be as I have intimated.

THE SPECULATION, FERØE Master.

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THIS was a case of a *Danish* vessel, taken on a voyage from *Dunkirk* to *Bordeaux*, 13th June 1799; and claimed, together with the cargo, for — *Lund*, described in some of the papers as master of the vessel.

Coasting trade of France expressly forbidden to Neutrals, by French ordinance. Misconduct of captors, as to taking depositions. Restitution. Captors expences forfeited.

For the captors, the King's Advocate stated—That the ship appeared to have been carrying on the coast-

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ing trade of *France*; a trade, not only generally forbidden, but expressly prohibited to neutral ships by the ordinances of *France*, which have issued during this war, that she would therefore come under the character of an adopted *French* ship; and in regard to the cargo, that there was such a variation respecting it, that it must of course go to farther proof; the bill of lading being avowedly colourable, describing *Lund* as shipper, whilst he himself on his examination describes the cargo to have been shipped by a *French* merchant; and, as one of the mariners deposes, "Mr. ——— of *Dunkirk* was lader and owner."

For the claimant, *Laurence* contended—That the evidence of the mariner, who gave this account of this property, was not entitled to the attention of the Court; that he was not examined till three weeks after the other depositions had been brought in; that he had, in the mean time, been a week on board the privateer, and at last only ventured to speak to his belief, without assigning any reason for it,

[Court—I perceive these examinations are taken at *Jersey*; the commissioners must understand that this is not the proper mode of proceeding. After the depositions have been taken and transmitted, the commissioners are not to go on examining afterwards; neither is it proper that the captor should take out the whole of the crew, and then come in afterwards with

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with a subsequent examination (a)—I shall pay no attention to this man's evidence.]

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Counsel—With respect to the ship it has not been held in the present war, that the mere circumstance of being engaged in the coasting trade of the enemy, does amount to that adoption, which will subject the

(a) The 23d section of the prize-act provides for the speedy expediting of the process of prize causes, in these terms:—And for the more speedy proceeding to condemnation, or other determination of any prize ship, &c. “That the Judge of the High Court of Admiralty, and of any other Court of Admiralty, which shall be authorized thereto; or such person or persons who shall be by them *commissioned* for that purpose, within five days after request made to him or them for that purpose, shall *finish* the usual preparatory examinations of the persons commonly examined in such cases, &c.”

And the 2d and 3d articles of Instructions to Cruizers direct, That the commanders of ships and vessels, so authorized as aforesaid, shall bring all ships, vessels, and goods which they shall seize and take, into such port of this our realm of *England*, or some other port of our dominions as shall be most convenient for them, in order to have the same legally adjudged.

3d article, That after such ships, vessels, and goods shall be taken and brought into any port, the taker, or one of his chief officers, or some other Person present at the capture, shall be obliged to bring or send as *soon as possibly may be*, three or four of the principal of the company (whereof the master, mate, or boatswain, to be always two) of every ship or vessel so brought into port, before the Judge of the High Court of Admiralty, &c. or his surrogate, or such persons as shall be lawfully commissioned in that behalf, to be sworn and examined upon such interrogatories as shall tend to the discovery of the truth, &c.

For the whole of the Instructions, see Appendix.

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property to condemnation. Of the latter regulations of the present government of France, it is not known how far they have been carried into execution; which is a material fact, of which the Court will always expect to be informed, before it proceeds to draw any conclusion from them: they could not at present be known to the captors in this case; and therefore they are no justification, to exonerate them from making the claimant compensation for this seizure.

JUDGMENT.

Sir W. Scott—This is the case of a ship taken on a voyage from one French port to another, which is certainly a sufficient justification of the capture, because the very circumstance of being engaged in conducting the trade of the enemy from one port to another, will justly subject the vessel to enquiry; and perhaps in some future case, the Court may have occasion to consider how far the regulations, that have been alluded to, and the acting upon them, (which it may be proper to consider at the same time); they not make such a trade liable to be considered as a case of adoption. As to the present case, I am compelled to observe, that although captors may have made a justifiable seizure, yet they may still forfeit that title by subsequent misconduct; and I think there is misconduct in this case, which may be traced up to them.

The third deposition is stated to have been taken at the instance of the captors; and it now appears that they took out all but two persons from the captured ship. I cannot help thinking, that to leave only two persons,

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The master was to take care of the ship; but the Court, exercising jurisdiction, which it has at all times declared of showing to the claimant, when their conduct is fair and honest, a point of good faith, and of being the owner, and all the personal expenses incurred by the crew, and to claim for the same.

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1799.

Notification of
blockade of Hol-
land—time for
constructive
notice at Rot-
terdam 15th
April 1799—
actually known
at Amsterdam
12th April.

THE CALYPSO, SCHULTZ Master.

THIS was a case, arising on the blockade of the United Provinces, respecting the time allowed for the communication of intelligence, and the consequence of taking in a cargo, after due notice of the blockade. It appeared that the ship sailed from *Rotterdam* on the 4th of *May*; that the cargo had been begun to be laden on the 4th of *April*, and that remaining parts were taken in so late as the 20th.

JUDGMENT.

Sir *W. Scott*—I think I am under the necessity of saying, that the notification of the blockade must have been known at *Rotterdam* on the 15th of *April*, as it has appeared in evidence in another cause, that it was known to the *Prussian* consul at *Amsterdam* on the 12th. I am therefore compelled to say, that the continuing to take in a cargo, after the time when the party was bound to take notice of the notification of blockade, will be sufficient to render the ship liable to condemnation: This is the determination which I am bound to make, in conformity to the principles which I have before laid down on the subject of blockade.

The master was in this case claimant of the ship; but the Court, exercising an indulgence, which it is at all times desirous of shewing to this class of men, when their conduct is fair and unimpeachable, in point of good faith, allowed him his private adventure, and all the personal expences incurred by his attendance to claim, &c.

THE WAR ONSKAN, BIRDUMPEL Master

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THIS was a case of a *Swedish* ship, taken by the *French* on a voyage to *Oporto*, and retaken by a *British* cruizer, 26th October 1799.

Salvage, not formerly given on recapture of neutral property, given this war, owing to the rapacious proceedings of *French* cruizers, and *French* Courts of prize.

In opposition to the demand of salvage, which had been allowed in *various instances* during the present war, it was said, That it had not been the practice of former wars to grant salvage on the recapture of neutral property; that in the present case there was the less reason for it, as the vessel was seized only on account of the cargo; which, according to the *French* laws, would be a cause of enquiry only and not of condemnation; and that the *French* prize master had expressly engaged that the vessel should be restored.

JUDGMENT.

Sir *W. Scott*—I do not mean to lay down any general rule on this subject; nor am I so fond of doing that, as gentlemen may be ready to propose it. It has certainly been the practice of this Court lately, to grant salvage on recapture of neutral property out of the *hands of the French*; and I see no reason at the present moment to depart from it. I know perfectly well that it is not the modern practice of the law of nations (*a*), to grant salvage on recapture of neutral

(a) In the early periods of *English* history (and perhaps much later) there are to be found traces of a pretension to appropriate to the captor, the ships and goods of neutral merchants that were taken by one belligerent out of the hands of his enemy. *Litera ad Regem Portugallie, super bonis de guerra lucratis responsiva*, 31 Ed. 3. A. D. 1357. *Rym. Fad.* v. 6. p. 14; and again, an. 2 H. 4. *Rym. Fad.* v. 8. p. 203. To the master of the *Teutonic Order of Prussia*.

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tral vessels; and upon this plain principle, that the liberation of a clear neutral from the hand of the enemy, is an essential service rendered to him, in as much as that same enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him with costs and damages for the injurious seizure and detention. This proceeds upon the supposition, that those tribunals would duly respect the obligations of the law of nations—a presumption which, in the wars of civilized states, each belligerent is bound to enter-

In the former instance a strong remonstrance had been made on the part of *Portugal*; and the answer, asserting the property to be legally acquired to the captors, is very full and explicit: In the latter instance, an embargo had been laid on *British* property, on account of the detention by the captors; and this fact of recapture from the enemy, was deemed a sufficient justification on the part of the *English* Monarch, to found a demand that the embargo should be taken off. In later times a more equitable practice has prevailed; and neutral vessels, taken out of possession of the enemy, have been restored, even without salvage, both in our Prize Courts, and in *France*, provided the property was affected by no circumstances, that would have incurred condemnation in the Court of the enemy.

Such was the limitation expressed in the *ordonnances* of *France*, *Code des Prises*, an 1784. “Sa Majesté a jugé pendant la dernière guerre, que la reprise du navire neutre faite par un corsaire *François* (lorsque le navire neutre n’étoit pas chargé de marchandises prohibées, et dans le cas d’être confisqué par l’ennemi) étoit nulle. See various decisions, *Conf. des Prises*, 1784, vol. 2. p. 725, 1024, and 1049.”

Whether the dangers to which neutral property has been exposed from *French* Courts and *French* cruisers during this war, have been sufficient to form an exception from the old rule, the reader will, in some degree, be able to judge for himself, by a summary view of their edicts, and the general character of their cruises, according to the estimation of their own writers, printed in the Appendix.

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min in their respective dealings with neutrals. But it being notorious to all Europe, in the present war, that there has been a constant struggle maintained between the governing powers of France, for the time being, and its maritime tribunals, which should most outrage the rights of neutral property; the one by its decrees, or the other by its decisions; the liberation of neutral property out of their possession has been deemed, not only in the judgment of our Courts, but in that of neutrals themselves, a most substantial benefit conferred upon them in a delivery from danger, against which no clearness and innocence of conduct could afford any protection; and a salvage for such service has not only been decreed, but thankfully paid, ever since these wild hostilities have been declared, and professed by France, against all acknowledged principles of the law of nations and of natural justice. When these lawless and irregular practices are shewn to have ceased, the rule of paying salvage for the liberation of neutral property must cease likewise. But of that fact no evidence whatever is offered, excepting that the French prize-master said, "That the vessel would not be prize, only the cargo." A thousand motives might extract such a declaration as this from him, very little connected with its truth. It might be only to conciliate the master, and purchase from him a corrupt testimony respecting the cargo. When the ship was once within the gripe of a French admiralty court, it was much beyond the power (supposing it within the inclination) of that master to say with certainty that she would ever find her way out of it. No proof is offered that the maritime tribunals of France have in any

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any degree corrected either the spirit or the form of their proceedings, respecting neutral property generally; and therefore I shall not think myself authorised to depart from the practice that has been pursued of awarding a salvage to the captors.

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1800.

THE MINERVA, HENRICKSEN Master.

Expences allowed on corn ships, of which the cargoes had been taken by Government; but only where the original evidence of property was complete, &c.

THIS was a question as to the allowance of expences in the case of a cargo of corn, taken 23d April 1794 in a *Danish* ship, on a voyage from *Amsterdam* to *Leghorn*.

It was objected by the *King's Advocate*—That the circumstances of this case did not come within the rule laid down for the allowance of expences in the corn ships: That the rule was to grant the expences in those causes where the evidence of property was clear and sufficient to obtain restitution on the original evidence; but not to grant them, where there was a defect of evidence, requiring farther proof. In such cases, it was held, that as the seizure was justifiable, the parties were not entitled to their expences. In the present case there was in the original evidence no proof of property, either in the papers or in the depositions (a).

Court—Then I fear this case does not come within the rule.

Expences refused.

(a) One sixth part of this cargo was condemned, as the property of the subjects of *Holland*.

THE CONQUEROR, TATE Master.

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THIS was a case on farther proof, on the claim of Case of property.
Mr. *Peschier* of *Copenhagen*, for a cargo of brandies, shipped in *France*, as it was asserted, for his account, and carried to *Holland*, and from *Holland* sent to *London*, for the *English* market; where they were seized as prize by the marshal of the Court of Admiralty.

JUDGMENT.

Sir *W. Scott*—This question arises on a seizure made by the marshal of this Court, in *December* 1794, of several parcels of brandies, on board this, and two other *British* ships in the port of *London*; and that circumstance would undoubtedly lead the Court to pay very great attention to any observations offered on the part of the claimant; because the *prima facie* presumption, arising on goods found in such a situation, is, that they are not the property of an enemy: The marshal would receive no encouragement from the Court to make hasty seizures on light grounds of suspicion; such a practice would manifestly operate to the great discouragement of the trade of this country; and therefore if it appeared, that a seizure was made on light information, it would be treated with no sort of indulgence, but on the contrary, receive very severe reprehension. On the other side, if it should turn out that the case was loaded with difficulties,

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culties, which appeared hardly consistent with a fair case; and if they remain unexplained, after the parties have had all opportunities given them of producing their explanation, with the advantage of having heard the remarks which the Court made on the deficiencies and difficulties of the original case; the marshal, in having made such a seizure, will have deserved the character of a careful and diligent officer of the Court.

In the first proceedings of the cause, a monition issued to bring in the papers, which had been delivered to some merchants of this city: among the rest, the bill of lading was brought in, but as it did not express the account and risque, the parties had a right to demand to be admitted to farther proof; and they had a right also, on the grounds above mentioned, to expect, that their explanations, and farther proof, would be accepted with the most favorable consideration that any case could receive.—The farther proof was brought in; but being of a nature calculated to generate new doubts, rather than to remove those which had been originally suggested, it was pronounced insufficient; and, still further proof was directed to be made. I am now to decide on that proof, and I am not to take up the cause, on the grounds stated, "*respecting the personal character of the parties;*" nor am I to attend to those consequences that have been mentioned, "that if this is not a fair case, "*Mr. Peschier is perjured; and Mr. Agier is perjured, &c. &c.*" The true nature of the proceeding is, that *they* exhibit the history of their case, and the proof they make of it; and I am to decide upon that:

that: if it should appear to be loaded with insurmountable difficulties, how it may hit the character of this or that individual, is a consideration foreign to the subject; I am to decide upon facts, and not upon reputations.

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In the first proof brought in, which very imperfectly opened the origin of the business, it appeared, that a ship which had been sent from *Copenhagen*, had found its way into a *French* port; being, as it was asserted, captured by a *French* privateer; and that the goods were immediately taken by the *French* government, and payed for by the present cargo. If I am right in my recollection, nothing appeared in that proof, either respecting the quality of the cargo or the property, or the destination to *America*: on all these material points, that proof was totally silent; the property of *that* outward cargo, was undoubtedly a point very material to be proved; for if *this* was a cargo, taken in payment for that, the owner of that cargo, must, *prima facie*, be taken to be the owner of the present cargo: it was therefore, necessary to determine that question. It now appears that the outward cargo consisted of *saltpetre*, *hemp*, and *iron*, going to *America*, and, as it is now stated, not on the account and risk of the present claimant, but on account of other persons resident in *America*; who would therefore be, *prima facie*, owners of the present cargo, unless the former interests should appear to be converted by competent authority, and handed over to the present claimant. The present claimant, before the Court, is Mr. *Peschier*, of *Copenhagen*; and his attestation states, "that in 1794, he received
" a letter from Mr. *St. John*, in *America*, informing

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“ him of the high price of these articles in *America*;
“ and ordering the shipment of a cargo for his ac-
“ count; and that this letter was destroyed by the
“ great fire which happened at *Copenhagen* in 1795.”
This is the reason given for the non-production of
that letter, a most material letter, for it lays the
foundation of the whole case; I mean of the truth,
of the destination of the former cargo to *America*,
whither it is asserted to have been going—and in a
peculiar manner, on the account of Mr. *St. John* of
New York, consigned to other merchants of the same
town; where Mr. *St. John* himself was established as
a merchant, and was capable of receiving it himself.
This circumstance has furnished an observation on
the part of the claimant, that such a complexity, and
multiplication of hands, through which the transac-
tions was to pass, gives it the appearance of a fair
case; for, that if it were fraudulent, it would have
been confined to as few actors as possible.—At the
same time, there is this difficulty on the other side;
that, if it is a fair case, it is not easy to conceive
why Mr. *St. John* should go so far out of the ordinary
mode of trade, as to direct a consignment on his ac-
count, to another person in the same town, where he
was acting as a merchant. It is not too much to say,
that there is a balance of difficulties on both sides,
on the ground of supposition; and therefore, leaving
them both out of the question, I can only observe
again, that it is to be lamented, that this letter, which
was the origin of the transaction, is not exhibited;
the reason given, is, that it was destroyed by the fire
at *Copenhagen*; at the same time it cannot be, but
that an original copy of that letter (if I may so call
it),

it), must be remaining in the copy book of Mr. *St. John*, in *America*; and indeed, it could hardly have been necessary to wait for a return from *America*, to supply the proof desired; for this, I think, must have happened, that much subsequent correspondence must have taken place; Mr. *Peschier* must have written to inform Mr. *St. John* of the sailing of this cargo; and there must have been other letters from *St. John*, or other merchants on his account, written to Mr. *Peschier*, in allusion to these original orders; and *they* might have been produced. These would have been very satisfactory to the Court, and would in a great measure have supplied the defect of the original order. But the fact is, that no such letters are produced; and it is an observation, that very much affects my mind, that no one letter *from* any merchants in *America*, or *to them* from Mr. *Peschier*, is brought forward.

It is said, that there could be no reason why Mr. *Peschier* should use the name of an *American* merchant; as he would have a perfect right to send such a cargo as a neutral merchant, to *America*, in his own name; and it is true. But I think I can see a reason why, if it was intended to find its way by any pretended accident to *France*, it should go under an *American* character; because, if it was the property of a *Danish* subject, it was particularly forbidden by the *Danish* treaty, to carry such articles to an enemy's ports. However, Mr. *Peschier's* attestation states, "that in *March* or *April* 1794, in pursuance of "these orders, he freighted the ship, *Christianshaven* "of Mr. *Agier*, and shipped a cargo of hemp, iron, "and saltpetre, consigned to *Murray* and *Barret*,

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“ of *New York*, for the account and risk of Mr. *St. John*; and sent a letter of advice to the consignees.” Now, this letter, if I am right, is the same letter as was sent on board the vessel, because, it does not appear, from any part of the account, that there was any other letter to Mr. *St. John*, than that to the consignees; and this is, in my opinion, a particular circumstance in the case: that having received an order for a valuable cargo, Mr. *Peschier* should take no other notice of it, than by writing to the consignees on board the ship in which the cargo was going. The letter is to this effect: “ By order, and for account and risk of our common friend, Mr. *W. A. St. John*, of *New York*, I have the honor of sending you by *F. Corran*, the bill of lading, &c., and beg you will procure a good reception for this loading, and act according to the direction of Mr. *St. John* respecting it.” This is all the information, as far as I can find, that Mr. *Peschier* sent to Mr. *St. John*, in respect to this cargo; a mere letter to the consignees, who were, as far as it appears, not privy to the orders. I cannot help thinking, that this is a very naked circumstance, and not a very probable beginning to such a transaction. The attestation then goes on to state, “ that no insurance was made, as he had received no order to that effect; and therefore no document of that kind can be exhibited.” Now that such a cargo as this should be going across the *Atlantic*, and no insurance be made, is not very probable; that it should be insured in *America*, could scarcely be, as Mr. *Peschier* had not sent any information respecting it; but, if it was going for the *French* government, it is very intelligible, that *they* might stand their own insurers, and therefore

therefore that Mr. *Peschier* might receive no instruction about it. The attestation says, "that Mr. *Peschier* wrote no other letters than this, to Mr. *Murray*;" none to Mr. *St. John*, who had sent him a very urgent one, stating the price of these articles, and the good speculation that they afforded in the *American* market. In return for this letter, and these orders, he does not write one syllable, to say even, that the orders had been executed, or were in a way of being executed, though Mr. *St. John* had attached so much importance to them. This, as far as I am able to judge, would be a very unnatural manner of transacting such a business. Mr. *Peschier* says, "he wrote no other letter to *America*, because "he heard the master had written, whom he had "intrusted to write in case of need; and that the "said master was an honest man, particularly recommended to him." It is to be observed, that he is taken up in this business, very little above the capacity of a common carrier master; the vessel is not Mr. *Peschier's*; he charters it, as he would have done any other vessel; the master was not the consignee, but was to deliver the cargo to *Murray*; then, I cannot see what trust was naturally in the course of trade reposed in him, more than in any other ordinary master. Mr. *Peschier* says, "that he had intrusted him to correspond with them in case of "need." In case of capture, it certainly was proper that he should write to the owners of the cargo; it is the duty of a master so to do; but I cannot understand, that he has authority to dispose of the cargo, or to enter into new speculations for the owner. It is scarcely possible I think, for a man to

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have deviated more from his instructions, than this man does : for how does he act ? In case of accident he was to have written to *America*, with the hope of receiving instructions from thence ; instead of that, he enters into an agreement about the cargo, and writes to Mr. *Peschier* on the subject, although it was a speculation in which Mr. *Peschier* was no farther concerned.

Mr. *Peschier* proceeds to state, “ that the ship, in “ the prosecution of her voyage, was forced down “ to *Dunkirk*, and taken and carried in by a *French* “ privateer ; and that he did not give the master “ directions in writing, because he was particularly “ recommended to him as an honest and faithful “ person.” If any power was given to him over the cargo, it should have been prescribed in written instructions ; and true it is, that the master in his protest, says, “ that he had been proceeding in his “ voyage according to written instructions, given to “ him by the freighters (a).” To account for this sort of contradiction, it is said, that Mr. *Agier*, his owner, and not the freighter, had given written instructions, and that he must have alluded to them. But I can hardly believe, that (at the moment of the production of these instructions), he should describe them as given by his freighter and not by his owners.

(a) “ It was stated in the extract from the Register of Reports of *Danish* captains, made to the *Danish* consul at *Dunkirk*, May 4, 1794, That *Corran* had declared, &c. to have departed from *Copenhagen*, &c. with a loading of saltpetre, hemp, and iron, destined for *New York*, intending to conform himself to the instructions of his freighter, this day produced at the office of this consulate.”

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Mr. *Peschier*'s affidavit states farther, " that on the
 " ship being taken and carried into *Dunkirk*, the
 " cargo was seized by the *French* government, and
 " payment was made by the brandies which were to
 " be taken in at *Brest*. That immediately on hearing
 " of the capture, he charged himself with the whole
 " care of this expedition, to save his friend, who was
 " at a distance, a number of troubles and inconve-
 " niences, and because he could prosecute the business
 " with more strength and energy; and more especially,
 " because he had not, at the time of capture, had a
 " convenient opportunity of drawing to the amount
 " of the cargo on *St John*, and feared that his bills
 " would be protested, if the news of the capture
 " should arrive before his bills were accepted."—

But, what reason could there be, for entertaining
 any such apprehension, if he had the letter of orders
 by him? At that time it could not have been destroy-
 ed:—What would have been the natural conduct?
 undoubtedly, that he should have written to Mr.
St. John, informing him of the capture and failure
 of that expedition; and stating his hope, to be able
 to execute the commission, with more success at
 another opportunity. But no such letter appears to
 have been written;—instead of that conduct, which
 it was almost unavoidably necessary for him to pursue,
 Mr. *Peschier* immediately charges himself privately
 with the whole concern.

The account proceeds to state, " that in *Sept. 1794*,
 " Mr. *Peschier* received the account of the shipment
 " of the brandies from the master, and also the
 " invoice and bill of lading of the *French* shippers,
 " and that he waited in expectation of the arrival of

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“ the said cargo at *Altona*; that according to his usual
“ custom, he had made no insurance; and that he
“ since has been informed, and believes that the ship
“ was driven *by bad weather* into the port of *Rotter-*
“ *dam.*” That is rather a singular expression. The
account given by the master is, “ that being in
“ want of a cable, and the ship leaking, he was
“ induced to put into *Roterdam.*” To be driven
into the port of *Rotterdam*, considering the situation
of that port, is not very intelligible; an inland port
very much up into the country. The master waits
for no directions; but forthwith unlivers the cargo,
and puts it into the hands of merchants at *Rotterdam*,
where it was prepared for the *English* market; after-
wards put on board other vessels, and sent to *London*.
This is the account of the transaction given, on the
part of Mr. *Peschier*, to supply the defect of the former
evidence, in respect to the quality of the articles,
and the destination to *France*; which are material
points, and which I cannot help thinking, were at first,
with a most sedulous caution kept out of the sight of
the Court. There was a delicacy and a reserve about
mentioning the nature of the cargo, that very much
inflamed the curiosity of the Court; it is at last ex-
tracted with some difficulty, that that cargo was
saltpetre, hemp, and iron; it finds its way into *France*
by one accident; and the returned cargo finds its way
into *Holland* by another. It is the misfortune of
this ship never to reach the haven where she would
be.

I am now called upon to consider the correspon-
dence between the master and Mr. *Peschier*; for as
to the persons in *America*, it does not appear that they
received

received the least information from any one person. —Mr. *Peschier* says, that the master had authority to write to them ; but he does not appear to have written, nor does he even describe his cargo as going to *America*.

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Then let us look at what must be the test of every transaction ; at what would have been *the natural conduct* of any person employed as the master of a vessel, with the care of a valuable cargo. It would undoubtedly have occurred to any person that it was *his* duty to write to the persons in *America*, and also to the shipper in *Europe*. What would be the duty of the *merchant shipper* ? undoubtedly to write to the merchant in *America* ; because, although the expedition had failed, it was still his duty to give him an account of it, and state the measures that he had taken to bear him harmless. Is it possible, that as a diligent merchant and a faithful agent, he should not be desirous of informing his employer of the friendly interposition that he had used to protect his interest, on failure of the original expedition ? Instead of that, the merchant in *America* is left to the meagre correspondence of the master, who had no authority to say that this cargo was taken back by Mr. *Peschier*. All that Mr. *Peschier* does, is to leave his friend in *America* to the correspondence of this master.

The first letter that I shall observe upon, is a letter from the master at *Dunkirk* to Mr. *Peschier* of 15th May 1794, informing him of the accident that the ship had met with ; that his ship was in the hands of the national guards :—" We have demanded permission to proceed on our voyage, which has been refused

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refused by the commander in chief of the marine; he says, I must apply to the commission of commerce for redress; and has ordered my whole cargo into requisition. I consequently mean to leave this place for *Paris* as soon as possible, in order to make every necessary application; and if an opportunity offers, will advise you of the event: *I mean to employ Mr. J. Swan, who is now in Paris, and with whom I have been long acquainted in America; besides, I am informed he has great influence.*"

The style of this letter is not very natural, for a man under such circumstances; that he should apply for redress is extremely natural; but is it not equally natural, that he should desire to have some instruction from Mr. *Peschier*, in one case or the other? If the cargo should be returned, was it not natural that he should say, I shall pursue my voyage to *America*; or if a *requisition* was to be put on his cargo, or a *prehension*, (as they sometimes phrase it), and compensation was to be made in money or in goods; was it not natural that he should ask what he was to do with one or the other? Instead of that, measures are immediately taken to go to *Paris*, and employ *Swan*, without asking any advice, either as to the success or miscarriage of his application.

The next letter is of the 20th of *June*:—"I have just returned from *Paris*, and after many applications, I have obtained promise of payment in Cognac brandies, for my whole cargo put in requisition: I have proposed to accept half in specie and half in *Bordeaux* wine; but specie I could not get on any terms. I mean to proceed in the ship or send her round to *Charante*, and as soon as I can get a statement

ment of the business from the commissioner of commerce, will give you a copy of the same. I have empowered Messrs. *Hennefsey* and *Turner* of *Cogniac*, with whom I have been long acquainted, to receive part of the brandies, and have them prepared for shipping."

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It is true that the master was to act for the best, and so far he may appear to have done; but the objection is, that having the opportunity of consulting the opinion of his employer, he never refers to his advice. When a man is placed under necessity, he must act under necessity; but when the necessity is removed, he still acts with the same ungoverned and uncontrouled authority, never once asking Mr. *Peschier* what he was to do, for this *American* friend, nor once mentioning his name.

The next letter is of 24th *August*, from *Charante*:—"I flattered myself, ere this time, to have had the pleasure of hearing from you in answer to mine of 15th *May* and 20th *June*, from *Dunkirk*, and of 26th ultimo from this place." And well might he be surprized; for that Mr. *Peschier* should have sent a valuable cargo, and have been in danger of losing it; and that he should not have written, but have rested on his oars for six months together; and more especially considering *France* to be as destitute of law as it has been for some time past; and that the master had never said what he meant to do with the brandies, is a course of conduct so irreconcilable to any notion that I can entertain of common mercantile prudence, that I consider it as utterly inconsistent with the feeling of a real proprietor on such an occasion. The master goes on:—"I assure you the said

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said gentlemen have exerted themselves, not only in procuring for me brandies of the best quality, but in getting coopers, &c. which are very difficult to be had here for private business, as almost all workmen and small vessels are employed on national account: and as soon as I settle my account here, and get a certificate from the agent national of this place, saying the quantity of brandy I have received, and a note of the quantity that remains on your account, I will proceed from hence to *Altona*, where no doubt you will be better pleased to have the brandies at that market than at *Copenhagen* at this season of the year."

Now, that the master should take it into his head to do this; that he should divest the *American* merchant of his interest, and take on himself to suppose, that the property was to revert back to the account of Mr. *Peschier*, and talk of it as for the account of Mr. *Peschier*; that he should go before the consul of his own country and make oath, that it was for the account of Mr. *Peschier*, when he must have had every reason to suppose it belonged to the merchant in *America*, is utterly inconsistent with any fair probability of the good faith of the parties concerned.

The master goes on:—"Should I meet with contrary winds I may perhaps go to *Guernsey* or *Jersey*; and although I have not your orders, if I am permitted, will endeavour to dispose of part of my cargo there on your account."

I have to observe, that this was not the business of a day; months and months elapse, with abundant opportunity of intelligence; and, as to what is thrown out, that jealousies might exist: what jealousy could exist

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exist about the exporting a cargo of brandy to *Altona*, more than to any other port? It is impossible that any such reason could have operated to obstruct the correspondence, in the manner in which it appears to have stagnated between these parties. I now come to the correspondence on the part of Mr. *Peschier*. The last letter of the master was dated the 24th of *August*. The first letter that Mr. *Peschier* writes in answer to those which he had received, bears date of the 21st *September* 1794:—"I have received three of your favours, of 15th *May*, 20th *June*, and 22d ultimo, from *Charante*; and note the contents: the latter covering a copy of the accounts you got settled with the commission of commerce at *Paris*; which settlement I think you were fortunate in obtaining. Your other favour of the 26th *July* I have not received. I hope this will find you safe arrived at *Altona* with the whole of your cargo, and that you have not put into *Guernsey* as you intended. I request you will have the cargo landed and nicely prepared, and ship them on board an *English* vessel for *London*: accompany them there yourself, and have them sold, and remit the proceeds to Messrs. *Lubbert* and *Dumas* in *Hamburg*, for my account."

I cannot help thinking, that Mr. *Peschier* has left his account of the correspondence with the master in a very imperfect state. This man is not *his* agent, but the master of another person's vessel. The first expedition was at an end; on what foundation could Mr. *Peschier* direct him to accompany the brandies to *London*? If he had been his private agent, such an instruction

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instruction would have been very natural : but, considering the master in the light in which he is held forward, as the master of another person's vessel, how is it to be understood, that Mr. *Peschier* should direct him to go in another vessel, and accompany his goods to *London*? He goes on:—"I will settle with your owner, and when I have the pleasure of seeing you, I will thankfully satisfy you for your strict attention to my interest. You will see that the amount is insured to *London*, or order, if so to be done, and that the brandies are not stronger than the *London* standard. I am so well satisfied with every part of your conduct in this troublesome business, that I cannot do better than leave the whole to your management; you will therefore act as you find most advantageous to my interest."

An observation on this part is, that there is no mention of any agent in *London*; but in another letter, written to the master at *Rotterdam* on the 7th of *October*, it appears, that Mr. *Peschier* did direct him to apply to Messrs. *Wolff* and *Dorville*:—"You will follow my advice of the 21st ultimo, the same as if you were at *Altona*; and have only to observe, unless you have already made choice of a house, that you will apply to my friends, *Wolff* and *Dorville*, who have my whole confidence, and will cheerfully serve you." So that, though the master was to come to *London*, where he would be in need of the assistance of a house, it is not till this late period that it occurs to Mr *Peschier*.

This letter was written to the master at *Rotterdam*, into which port, it appears, he had been driven;
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and where, it appears, he had himself come to the resolution of sending the brandies to *London*, without the direction of Mr. *Peschier*; and it is on the 26th of *September* that he writes to Mr. *Peschier*, informing him of the accidents that had carried him thither, in these terms:—"No doubt, ere this, you expected me at *Altona*; but a multiplicity of disappointments and delays had kept me so long at *Charante*; and I am sorry to inform you we are driven into this place very leaky, with loss of sails, a cable, and anchor; and must have my cargo all taken out, before I can repair. I am afraid the season will be far advanced before the necessary repairs can be done; consequently, I have engaged a warehouse for the brandy; and, was it not for the situation of affairs at present in this country, a good price might be obtained for part: under these circumstances, I am of opinion, it would be a good plan, to send some to the *English* market, as, by the last accounts, the prices of good brandy are very high.—Should I resolve on this, I find it will be necessary to have them prepared exactly at the strength admitted into that country; nor will small casks, I am informed, be allowed to be imported. I have taken the assistance of my friends, *Rocquette, Elziviere* and Co. of this place, who have engaged to do the business for one-half *per cent.* exclusive of duties, cooperage, &c. and to use their best to give me dispatch."

Is this such a letter as a man would write to the owner of his cargo; no time, no day mentioned when the accident happened. Certain it is, that he had been in *Rotterdam* some days; he had been landing his cargo and speculating on the state of commerce there:

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there: he says, "a good price may be had for a part of it here." Is it not natural that a trusty person, meeting with this accident, should not write immediately, and state the time when the accident happened? Instead of that, he writes, "I find a good price may be obtained in the *London* market; should I resolve on that, it will be necessary to have them repaired here." Was *Holland* in such a state, that the master could receive no instructions from Mr. *Peschier*? Is this the style of a man soliciting instruction? on the contrary, it is the style of a man acting with uncontrouled authority, as if the property belonged to himself. "Should I resolve on this; &c."—"I have applied to my friends *R.* and —, who have undertaken it, &c." Is a carrier-master to make this election, without reference to his employer? or is Mr. *Peschier*, who is a man of large and spreading concerns over *Europe*, without any correspondent at *Rotterdam*? or is it for the master to take upon himself to make choice of agents, without a reference to his employer, in respect to the care and judgment of the person employed? On the 14th of *October* the master writes again to Mr. *Peschier*, and says,— "Your esteemed favour of the 21st ult. for the first time, came this day to hand: I am happy that my conduct has procured your approbation."—I may be wrong, but I protest it appears to me that his conduct had been directly such as could not meet with approbation. In the same letter the master says, "that *Rocquette* and Co. had recommended him to *Vandyke* and Co." and in answer, Mr. *Peschier* says, in his letter of 21st *December*, "that he hears his brandies,

in the hands of *Vandyke*, are seized in *England*," and directs the master to go to *London* immediately, to endeavour to obtain restitution, but recommends *Wolff* and *Dorville*; but still the appointment of the master prevails. The master had written on 22d *October*:—"I also observe you with Messrs. *Wolff* and *Dorville* to have the business, to which I would gladly comply, had we not already given the whole management to Mr. *Vandyke* and Mr. *Broomfield*, who have orders to remit two-thirds of the value, or honour draft to that amount, on your account." And, notwithstanding the direction of Mr. *Peschier*, in his letter of 21st *December*, the business remains in the hands in which the master had chosen to place it. Is not this a feature of a most extraordinary nature, that a merchant should acquiesce in the adoption of an agent, utterly unknown to him, and obtruded on him by the officiousness of this volunteer agent in *Holland*?

Looking at the whole of this case, I find so many improbabilities attending it, in every part, that I cannot compel my mind to a belief the property is as claimed; and, adverting carefully to the nature of the seizure, (which I have said ought to entitle the parties to every favourable consideration), I must still think, that the proof does in no degree correspond with the claim. The consequence will be, that this cargo must be pronounced subject to condemnation.

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THE HARMONY, Bool Master.

Case of domicil—respecting the national character of a partner in an *American* house, residing for a considerable time in the enemy's countries.—His property considered as the property of an enemy. Condemned.

THIS was one of several *American* vessels in which a claim had been reserved for part of the cargo, on farther proof to be made of the national character of *G. W. Murray*, who appeared in the original case, as a partner of a house of trade in *America*, but personally resident in *France*; restitution had been decreed in the several claims to the house of trade in *America*, with a reservation of the share of this partner.—The case was argued on this day, and again, on production of further affidavits at several times.

JUDGMENT—pronounced *November 19th, 1800.*

Sir *W. Scott*—This is a question which arises on several parcels of property claimed on behalf of *G. W. Murray*; and it is in all of them a question of residence or domicil, which I have often had occasion to observe, is in itself a question of considerable difficulty, depending on a great variety of circumstances, hardly capable of being defined by any general precise rules: The active spirit of commerce now abroad in the world, still farther increases this difficulty by increasing the variety of local situations, in which the same individual is to be found at no great distance of time; and by that sort of extended circulation, if I may so call it, by which the same transaction communicates with different countries, as in the present cases, in which the same trading adventures have their origin (*perhaps*) in *America*, travel to *France*, from *France* to *England*, from *England* back to *Ame-*

rica again, without enabling us to assign accurately the exact legal effect of the local character of every particular portion of this divided transaction.

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In deciding such cases, the necessary freedom of commerce imposes likewise the duty of a particular attention and delicacy; and strict principle of law must not be pressed too eagerly against it; and I have before had occasion to remark, that the particular situation of *America*, in respect to distance, seems still more particularly to entitle the merchants of that country to some favourable distinctions. They live at a great distance from *Europe*; they have not the same open and ready and constant correspondence with individuals of the several nations of *Europe*, that these persons have with each other; they are on that very account more likely to have their mercantile confidence in *Europe* abused, and therefore to have more frequent calls for a personal attendance to their own concerns; and it is to be expected that when the necessity of their affairs calls them across the *Atlantic*, they should make rather a longer stay in the country where they are called, than foreign merchants who step from a neighbouring country in *Europe*, to which every day offers a convenient opportunity of return.

In considering this particular case, it may not be improper to remark, that circumstances occur in the evidence that address themselves forcibly to private commiseration, remarking, however, at the same time, that public duty can allow only a very limited effect to such considerations, and still less to another that has been pressed upon me, that the money, if restored, is to go in payment of debts due to *British* creditors,

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creditors, from the bankrupt estate of this unfortunate person. My business is to inquire whether he is entitled to recover it, without regard to the probable application of it, if it finds its way again into his possession.

Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that *may, probably, or does actually* detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a law suit; it may happen, and indeed is often used as a ground of vulgar and unfounded reproach, (unfounded as matter of just reproach though the fact may be true), on the laws of this country, that it may last as long as himself: Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him and mixed themselves with his original design, and impressed upon him the character of the country

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country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, and other means, to the strength of that country, I am of opinion, that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there *must* be.

In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a domicile in a certain space of time, would nevertheless have that effect, if distributed over a larger space of time. Suppose an *American* comes to *Europe*, with six contemporary cargoes, of which he had the present care and management, meaning to return to *America* immediately; they would form a different case from that, of the same *American*, coming to any particular country of *Europe*, with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with

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few exceptions, that mere length of time shall not constitute a domicile.

The facts of this case are, that three parts of the property claimed on the part of the house of trade of *Murrays and Wheaton in America*, have been restored: and the present question arises on the share of Mr. *G. W. Murray*, in respect to his national character. A question has been made as to his original *American* character; and it has been contended that he is to be considered as a *British* subject, trading with *France* in violation of his allegiance: but I think the facts hardly bring him within the reach of this principle. By the affidavits, it appears, that being born in *England*, he went out very early, destined to settle in *America* in his childhood; the intention having been fully entertained and decided, at the time of the declaration of independence, and nothing but his extreme youth, or rather childhood, having prevented his migration—This is sufficiently proved: He went out in 1784; and I should hold that he was equitably entitled to the *American* character. The only question will be, whether he is not to be deemed to have acquired and superadded a *French* character since that time; and this question must be determined by the affidavits brought in, and by the letters which were on board the ship, and which are supposed to disclose sufficiently the real designs and conduct of the party.

The first affidavit of Mr. *J. Murray*, the brother of the claimant, annexed to the claim 27th July 1795, states — “ That Mr. *G. Murray* is not at this time in *America*; that he came to *Europe* from *New York* in *January* 1794, as supercargo,
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in a vessel belonging to the deponent's house, and sold the cargo of the said vessel in *France*, and some time between *April* and *June* 1794, came to *England* on business of their said house; and from thence, some time afterwards, proceeded to *Hamburg*; and from thence, in *August* or *September*, to *Paris*, and other parts of *France*, where the interests of the said house detained him until *May* last, [1795], when he came again to *England*, and has gone again to *France*, not long since; and has by this time probably left *France* for *Hamburg*, where the interests of himself and the house of *R. Murray and Co.* have called him."

In that affidavit there was no negation of an intention of returning to reside in *France*; therefore the property could not be restored. A second affidavit was then exhibited of *Mr. J. Murray* 19th *August* 1795, negating such an intention, and stating, "that the said *G. W. Murray* has not at this time, as the deponent verily believes, nor ever had, any intention of residing or making his domicil in *France*, nor in any part of *Europe*: that the said *G. W. Murray*, who is the deponent's brother, has been married in the United States, and has one child now there, and that when he came to *Europe*, early in last year, he did not expect to be absent from home more than six months; but that their said house of *Robert Murray and Co. of New York* having made several shipments to *France*, the said *G. W. Murray*, on account of the disturbed and critical situation of commerce, thought it adviseable to comply with the request of his said house, to stay some time longer in *Europe*, in order to hasten the sale of the afore-

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saïd cargoes; and to endeavour to close the accounts respecting them; and, that the almost total stagnation of all mercantile business in *France*, has prevented a sale being made of the merchandize which is there, belonging to their saïd house: and the saïd *G. W. Murray* did often, while in *England* last *May*, express to the deponent his desire and expectation of returning to his family in *America*, in the course of the ensuing month of *September*; but he is prevented now from doing the same, not having been able to close, in *France*, the affairs of the saïd *Robert Murray and Co.*; the expediting of which is the sole cause of his being there; and that so far from his being settled or domiciled in that country, he pays the merchants resident there the usual commission for transacting business of his saïd partners: that he well knows it to be the absolute determination of his saïd brother, as speedily as possible, to return to his residence in the United States; but that he, as well as the deponent, on account of the critical situation of their property in *Europe*, consider it their duty to their partners to be still longer absent from *America*; but that as soon as the sales of their saïd property are closed, and the proceeds received, it is their intention immediately to return home to the United States."

This matter being left in rather an undeterminate state, as to the time of the return, on the 21st *Aug.* a third affidavit is brought in, in which *Mr. J. V. Murray*, "referring to his affidavits of the 27th *July* and 19th *August* instant, made oath, that as to the probability of *George William Murray's* having gone to *Hamburgh*, as stated in his affidavit of the 27th of *July*,

July, his assertion was owing to information which he received a few days prior thereto, that such a step was necessary for promoting the interest of their house: that he now knows that the said *George William Murray* found it afterwards to be of more importance to the shipments, that his said house had made for him, to stay some time longer in *France*; and that he did not conceive that his aforesaid assertion had a relation to, or was contradictory to the wish expressed by the said *George William Murray* in *May* last, to return home in *September*, as he had found it impracticable so to do (for the reason stated in this deponent's affidavit of the 19th instant), before he had any thoughts of going to *Hamburg*; which last circumstance was mentioned by the deponent, merely to shew that his said brother was not domiciled in *France*: and he farther expressly says, that the stay of his said brother in *France* at this time is merely on account of the cargoes which had been transmitted before; namely, *on the sole account of those cargoes which* his aforesaid house had shipped, and which had arrived prior to the date of his first affidavit of the 27th of *July*: that so soon as the aforesaid cargoes are sold, and the proceeds received, his said brother will leave *France*, and will not stay a day longer on account of any other that may be shipped or arrive, or on any other account whatever." On the 26th of *August*, Mr. *George William Murray* himself appears, and makes an affidavit, conformable to those made by his brother, and stating, "that he arrived on *Saturday* evening last in *England* from *France*, where he had been, as stated in the affidavits of his brother *James Valentine Murray*, for the purpose of expediting the sales

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sales of shipments, that had been made by their said house, as expressed in the said affidavits; and having perused the said affidavits, dated the 27th *July* last, the 19th and 21st *August* instant, he saith, that the contents of the said affidavits are just and true, and that his stay in *France*, as mentioned in his brother's affidavits, *was merely on account of the cargoes which had been transmitted before, viz. on the sole account of those cargoes which his house had shipped from America for France, and which had arrived prior to the 27th of July last, being the date of his brother's first affidavit: that he has no other business or concerns to detain him in Europe, but the settlement of the said affairs, viz. the prior shipments deposed to by his brother; that should even the said settlement not be accomplished in a short time, viz. within two, or at the utmost, three months, he must leave them in their present state, in order to embark for the United States, where his presence is absolutely necessary, for the interest of his said house.*" Nothing appears here to shew that it was his decided intention to remain in *America*.

On the 6th of *October* 1795, Mr. G. Murray made another affidavit, which states, "That early in the last year, he came from *New York* to *Europe*; that he had not, at that time, nor has he ever had, or now has, any intention of residing, or making his domicil in any part of *Europe*; that he has been married in the United States, and has one child now there; that this deponent came to *Europe* as supercargo of the brig *Peggy*, belonging to his said house, and did not expect to be absent from home, longer than the disposal of the said cargo required;

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required; but being unable to get paid for the said cargo, he, in the month of *May*, quitted *France*, and came to *England*, and afterwards went to *Hamburgh*, and again returned to *France* in the month of *September*, to endeavour to obtain payment for the said cargo; that during his stay there for that purpose, two other cargoes, the one on board the *Mary Ann*, and the other on board the *Six Brothers*, the property of his said house, arrived at *Bordeaux*, consigned to *Lubbert and Co.*, and at the request of the said house, and on account of the disturbed and critical situation of affairs in *France*, was induced to prolong his stay there, to expedite the sale of the said cargoes, by the said *Lubbert and Co.*, (who were to be paid a commission on the said sale), and to close the accounts respecting the same. That the house in *America*, supposing the deponent might be detained in *France* on the aforesaid concerns, until the arrival of some of their subsequent shipments, thought it prudent, lest their former agents might not be in a responsible situation, on account of the fluctuating state of affairs in *France*, to consign the said cargoes to the order of this deponent, or to his assigns; the said house-presuming, that if this deponent had quitted *France*, he would have left an authority with some respectable house, for the receiving and disposing of the said cargoes."—That he had fixed various times for quitting *France*, and returning to *America*, might be; but as to any purpose of coming to *England*, not created by the capture of the cargoes, he says nothing; that he would have otherwise come, is not at all expressed in,

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or to be inferred from these affidavits. However, he avers fully, his intention of returning to *America*: there is not the least intimation given of any intention of returning back again to *France*; and any one would suppose, that he had thrown up the business of these two cargoes, and was fully bent on making his final settlement in *America*, without casting an eye back to *France*.

The letters that were found however, on board one of the ships, the *Jefferson*, express somewhat of a different purpose; and state, that it was necessary for one of the partners to reside in *France* for some time. The case which these letters rather intimate than disclose, is, that the two brothers, *James* and *G. W. Murray*, were to come to *Europe*, to be differently distributed in *England* and in *France*, to conduct the affairs of their house; when I say this, I speak rather of the intention and wish of the partners in *America*, as it appears in their correspondence, for the letters are all from them; there is not one letter introduced from either of the *Murrays* in *Europe*; and therefore, it is open to an observation on one side, that the *Murrays* in *Europe* possibly might not concur in this intention; as it is on the other, that it is highly improbable, that such a plan should be so strongly in the contemplation of the partners in *America*, and that they should be writing to these gentlemen on the prospect of a constant residence in *Europe*, without any privity and concurrence on their part, and whilst they were intending a speedy return to *America*. Now, supposing this to have been the case, and that there was an intention on the part of Mr. *G. Murray*, of fixing his residence in *France*, in the
same

same manner as Mr. J. Murray has resided here in Great Britain, I cannot accede to what has been advanced in argument, that it would not fix on either of them, a *French* or *British* character. If a house of trade sends a partner to *France*, with an intention even of not mixing in any other trade, than the business of that house; yet I think, that such a circumstance, connected with a permanent residence in *France*, would impress a national character upon him. It appears that Mr. J. Murray, the brother stationed here, on the same sort of footing, has been considered by the common law of this country, as a *British* trader, subject to the bankrupt laws of this kingdom; and as such, a commission of bankruptcy has issued against him; and on the same reasoning, if Mr. G. Murray has been resident in *France*, during the greater part of the war, conducting the business of his house, receiving cargoes, and disposing of cargoes, and giving accounts of the markets in *France*, and directing mercantile adventures there; it is, in my apprehension, impossible not to consider him as a resident trader of that country.

Amongst the letters, there are many, which it will not be necessary for me to go through; it will be sufficient to state, that they all concur in expressing a general expectation, that these persons would be resident in *Europe*. The expressions are various in the different letters; but they all concur in pointing to the purpose of a general, and continued commercial agency in *Europe*. In the *Jefferson*, they write, "we draw on your capital in *Europe*," speaking of it as if it were a distinct establishment; and there are besides several passages to the same effect. "It will
" enable

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“ enable us to form some plan for *our next winter's*
 “ *operation.*”—“ Advice *respecting contracts with*
 “ *government*;—and a recommendation to *purchase*
 “ *prize ships.*”—“ We may look forward to a time,
 “ *not very remote*, when the genius of liberty will
 “ bear down all its opponents, and create a crush in
 “ *commercial Europe*, never before experienced. *In*
 “ *such an event*, we are better circumstanced than
 “ most others; as every thing, being under your
 “ *immediate direction*, will prove a great security.”—
 “ Other friends hope to be benefited by your success
 “ and industry in *Europe* ;” all shewing, on the part
 of them in *America*, a strong expectation, either
 that Mr. G. Murray would be long resident in *France*,
 or that he would have made provision for the dispatch
 of their business there.—At the same time, it is not
 to be denied, that there are some passages which in-
 timately intimate a designed return to *America*. There is a pas-
 sage in a letter from Mr. R. Murray, to his brother
 George, (dated *New York, March 27, 1795,*) alluding
 to the settlement of affairs: “ I mean to take up our
 “ books, to get in forwardness the object of a
 “ general settlement, which we all wish to have
 “ effected soon after your return:” and there is a
 reference likewise, to domestic incidents: one (suf-
 ficiently affecting) with respect to his favourite in-
 fant child, expressing a hope, “ that he would be
 “ able to articulate, and bid his father a welcome on
 “ his return.” These are represented as inconsistent
 with the view which I am disposed to take of his in-
 tention;—but by no means—I think it is perfectly clear,
 that Mr. G. Murray meant to go to *America* ; and he
 is entitled to the full benefit of that fact. The mis-
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fortune is, it is equally clear, that he intended to return again to *Europe*, and, with that intention pointed particularly to *France*:—I do not say, that a return to *France* for a short space of time, would have affected him; but it must depend on the time, and on the nature of his residence, after the return, whether it will have that effect or not; because, if it should appear that he went to *America*, merely for a short time, and then returned to *France*; it can hardly be considered as a legal interruption of his residence in *France*; his return will connect itself with the former residence, and it must be taken altogether, as constituting in law, a continuation of the general residence in *France*. The fact is, as it appears from the affidavits of Mr. *Charles Murray*, (another brother of the claimant), 5th July 1799, and 30th October 1800, (for Mr. C. Murray has not thought proper to give us any information), that he returned to *France* in June 1796; and that he staid there at least, till August 1800; the entire space of four years and more.—Perhaps it would not be too much to say, that there is no definite satisfactory proof, that he has, even at this moment, quitted *France*; his own letter, dated *Bordeaux*, 22d of August, which has been brought in, states, “that he had taken his passage on board the *Franklin*;” and another letter, not from himself, but from Mr. *Barnet* of *Bordeaux*, dated August 27th, to Mr. *Charles Murray*, says, “that he had embarked, and was to sail tomorrow;” and there his history ends, no proof whatever being offered that that ship carrying Mr. *Murray*, did sail. I have no evidence beyond the letter, purporting to be the letter of a *French* merchant, that he had
taken

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taken his passage in a vessel, which was so expected to fail.

This is the whole evidence, excepting the belief of Mr. C. Murray, "that he is actually gone;" and when I recollect that Mr. C. Murray, in an (a) affidavit made January 20th, 1800, supposed him to be at *Hamburgh* or *Sweden*, in *January*, and ready to depart for *America*; and that six months after this, the captors find in a paper on board the *Clarissa*, and signed by him, *March* 1800, that he was remaining in *France* at that time, giving all credit to the sincerity of Mr. C. Murray's deposition, I cannot take

(a) "That in the month of *October* last, he received a letter
" from the said *George William Murray*, who was then in *Hamburgh*, informing him of his arrival there, and expressing his intention of writing again soon; which letter, this deponent does
" not now annex hereto, as it relates to private concerns, wholly
" unconnected with this, or any other cause in this Court, in
" which, the said *George William Murray* is interested: but, in
" case the Court should require it, this deponent is willing to
" satisfy it as to the place and time of the date of said letter.
" That since the receipt of the said letter, he has not further heard
" from the said *George William Murray*; but by a letter he received soon after from *James Valentine Murray*, he mentions
" the expectation of the said *George William Murray*'s proceeding
" to *Sweden*. And in another letter received a few days since by
" this deponent, from the said *James Valentine Murray*, dated
" 3d of *December* last, he informs this deponent, that it was
" probable the said *George William Murray* would now shortly return to *America*; and this deponent, from these circumstances,
" and well knowing the anxiety of his brother, the said *George William Murray*, to return to his wife the first moment in which
" circumstances would admit of it, is induced to believe that the
" said *George William Murray*, if he has not already quitted
" *Europe* for *America*, is now on the very point of so doing."

It

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it as a fact clearly proved, that he is gone to *America*, much less to remain there;—taking it however most favourably, that he has actually withdrawn himself in 1800, there is a fact of residence from *June 1796*, to *August 1800*, (above four years), connected with a residence of above a year, before his return to *America*; and that return, accompanied with a purpose of coming back to *Europe*, that remains to be explained.—Whether any explanation could be given of such a residence so long continued, is, upon the principles laid down, somewhat questionable to me. Time, I have said, is a great agent in these matters, and I should have been glad to have heard any instance quoted, on the part of *Mr. Murray*, in which a residence of four years, connected with a former residence, and which I must consider as a legal uninterrupted residence, was deemed capable of any explanation. But supposing it to be so, it must at least be required, that the explanation be first, clear and satisfactory in itself; and secondly, supported in a satisfactory manner. What is the explanation of this residence? The great point to be explained, will be the employment of that long continued residence:—Was it a residence utterly unconnected with any mercantile operations at that period? The affidavit of *Mr. Charles Murray*, 5th *July 1799* (a), states, that his brother went to *America* in 1795,

(a) Affidavit in which *Charles Murray*, referring to conversations with his brother in *September 1795*, says, "That *George William Murray's* statement was, that although the
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1795, to conduct some operations which the high price of markets suggested, and with hopes of re-
turning

“ interests of his house were, at that moment, somewhat injured
“ by the capture and detention of several of their cargoes, by
“ *British* ships of war, (of some of which captures, the said
“ *George William Murray* was informed while at *Norwich*), yet
“ he considered that as a temporary inconvenience only; that the
“ then state of markets in *Europe* suggested some operations
“ which he conceived would be highly advantageous to the house,
“ in the conducting of which his presence in *America* would be
“ necessary, and that accordingly he intended to sail for that
“ country in the next month, and hoped by the ensuing spring to
“ be able to return to *England*, for the purpose of winding up and
“ settling the whole of the concerns of the house in *Europe*; and
“ that in the event of such a settlement, it was his, the said *George*
“ *William Murray*’s intention, and that of his brother, the said
“ *James Valentine Murray* to make *America* their sole place of
“ residence in future: That in part pursuance of the said *George*
“ *William Murray*’s intention as aforesaid, he sailed for *America*
“ early in the month of *November* 1795, and arrived there in the
“ following month; that after his arrival, his said house of *Robert*
“ *Murray* and Co. purchased several cargoes consisting chiefly of
“ rice, and consigned the same to *England* for the purpose of
“ being sold here, or forwarded to some other *European* market
“ as might be found most advisable; and the said *George William*
“ *Murray* (as this deponent believes) in further pursuance of his
“ aforesaid intention, after completing the most of the said
“ purchases, returned to this country again in the beginning of
“ *May* 1796, for the purpose of superintending the sale of the
“ said cargoes, they for the most part being consigned to him;
“ That on the arrival of the said *George William Murray* here, he
“ found that an immense loss must arise upon the said expected
“ cargoes, besides which a considerable derangement in the affairs
“ of his house had occurred, arising as this deponent has been in-
“ formed and believes, principally from the delay in payment of
“ very large sums due to the said house from the *French* govern-
“ ment, and also from the above-mentioned capture of this and
“ several

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turning to *England* the ensuing spring, for the purpose of winding up and settling his concerns in *Europe*; and

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" several other ships, laden with cargoes of provisions, belonging
" to the said house, by *British* cruisers, which cargoes were
" bound to *France*, where they then bore great prices; and it
" being represented to the said *George William Murray*, that the
" most outrageous threats had been made against him by persons in
" *London*, holding bills of the said house, he conceived it most
" prudent, and was advised, not to expose himself to them until
" the funds of the house should be so centered in this country, as
" to enable it to face its engagements; and accordingly the
" said *George William Murray*, having first transferred the ma-
" nagement of the sale of the said cargoes then expected to
" arrive here, to Messrs. *Bird, Savage, and Bird*, of *London*, the
" mercantile correspondents of the said *Robert Murray and Co.*
" he soon after went to *France*, in order to use his utmost en-
" deavours to procure payment from the *French* government, and
" to arrange other outstanding concerns of the house in that
" country, with the intent to remit such sums as he should re-
" ceive, to the said house of *Bird, Savage, and Bird*, and not
" with any intent of settling as a merchant in *France*, or of em-
" ploying the funds which he should so collect there, in any manner
" whatever in the trade of that country: That certain creditors
" of the said *Robert Murray and Co.* at *Hamburgh* having laid
" attachments on all the property of the said house in *France*, of
" which the said *George William Murray* would otherwise have
" had the controul, the said *George William Murray* was thereby
" rendered unable to fulfil his said intention of remitting funds
" from *France* to this country, and the said *Robert Murray*
" and *Co.* have never since been able to obtain the command of
" that property: That if no other circumstances had rendered
" the return of the said *George William Murray* to *America* unsafe,
" he would have returned thither long ago, but the creditors of
" his house in *America* having thrown *Robert Murray*, one of the
" partners into confinement, the other partners were unwilling
" to expose themselves to the like violence; and this deponent
" believes that the residence of the said *George William Murray*

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and it is said, in argument, that these operations in *Europe*, are to be exclusively confined to operations in *England*; and that some cargoes of rice did actually come to *England*. But I cannot help thinking that if so, it was an unfortunate circumstance that he did not come himself, except for a very short time; for, as the matter stands now, it affords a suggestion that these operations were to be extended to *France* full as much as to *England*. It appears besides, that the rice was destined "to *England* or some other *European* market:" therefore it is not impossible that even this rice might have found its way to *France*. The affidavit states further, "that his return to *America* was delayed by waiting for payment from the *French* government." Now I must ask, what was this contract with the *French* government? there is nothing in his own affidavit which points to any other transactions than those respecting the cargoes of the ships *Mary Ann* and *Six Brothers* that remained unsettled.

The affidavit states further, "that he was alarmed by the outrageous threats of his creditors in this country, and that he was advised to go to *France*," as he actually did in *June* 1796, and the affidavit concludes with a belief on the part of Mr. *Charles Murray*, that his brother was not in *France* in a mercantile character or for any mercantile purpose.

"in *France* at any time since the said captures, was solely a matter
 "of personal and temporary convenience and necessity, arising
 "from the said circumstances of the debts due to his house from
 "the *French* government, and the unfortunate derangement of
 "the said *Robert Murray* and Co.'s affairs; and that such reliance was not in anywise for the purpose of trade or connected with trade, save as aforesaid."

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When I find, that he went there, as a mercantile man, that he staid there four years, and that he was a man who came from *America* for the very purpose of mercantile operations in *Eukope*, I feel a difficulty in saying, that (exclusive of all trading) satisfactory reasons are assigned for it; or supposing him to have gone to *France* for the purpose of obtaining payment, I should still find a difficulty in saying, that the original purpose could privilege a residence of four years. Is it possible for me to say, then, that the explanation which is given in this affidavit is quite sufficient, supposing that no objection lay to the mode in which it is offered?

And I come now to observe, on what I consider as the fatal objection, that the whole depends on the single affidavit of Mr. *Charles Murray* the brother. There is not one word coming from Mr. *G. Murray* himself to shew what was the nature of his connection with *France*: Surely the information of Mr. *Charles Murray* is very incompetent: a striking instance of his incompetency is that he supposes his brother gone to *America*, when it appears, that months after that time he was living in *France*. Can I suppose him sufficiently instructed as to all the courses of his brother's proceedings, to enable him to state satisfactorily to the Court the nature of his engagements in *France*? It is impossible that the Court can take the account of such a person, that the residence of his brother in *France* was not connected with any mercantile engagements, unconfirmed as it is, by the gentleman himself; who, though at hand, as I may say, and in a neighbouring country, has not thought fit to give us any explanation. He knows the course and nature

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of his own transactions, and yet he expects restitution, without taking the trouble of making so much as an affidavit for the purpose. After six years residence (as I must deem it) in *France*, and with all possible opportunity allowed him for that purpose. From *October* 1795 not a single word comes from him till the present day in *November* 1799. I own I think it impossible that the Court can be expected to restore on this evidence. Taking it on the present evidence, as to the sufficiency of the explanation and the mode in which it is offered, it is impossible.

Then the only question is, whether I shall allow further opportunity to the party, and give time for farther explanation? Considering the length of time which the cause has continued before the Court, with a degree of indulgence, perhaps open to some complaint on the other side, and the manner in which it has been put off from month to month, I do not think it any part of my public duty to allow such opportunity. I do not say, that before another Court *Mr. Murray* may not supply the defects of his case, and by his own evidence; but finding myself under the necessity of determining on the evidence now before the Court, which is, as I have before stated, that *Mr. Murray* has been in *France* four years, at least, and that, connected with a former residence there; and that there is no direct proof that he has now quitted it; I feel myself under the necessity (which, if I might be allowed to speak as a private person, I should perhaps describe as a painful necessity) of condemning his share of the property in these several cargoes.

THE ROSALIE AND BETTY, GEBHARDT Master.

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THIS was a case of a ship and cargo, taken on a voyage from the Isle of *France*, as asserted, to *Hamburg*, 31st May 1799. The ship was claimed for Mr. *Baurman* of *Emden*, and the cargo for Mr. *Kaster* of *Hamburg*.

A case of property, connected with circumstances of fraud: Effect on allowance of farther proof: Condemnation.

JUDGMENT.

Sir *W. Scott*—This is the case of a ship and cargo, taken on a voyage from the isle of *France*, as asserted, to *Hamburg*, and the question is, according to my view of it, a question of property; for I am of opinion, that the question, as to the legality of the trade, does not arise; as the cargo, being intended for the port of the owners of the cargo, is entitled to the favourable construction of that order of council, which permits the trade of neutral vessels from the colony of the enemy to *their own ports*; till I am better instructed, I shall hold, that the right to engage in such a trade is not vitiated on the part of neutral merchants, by the circumstance of the cargo being put on board a neutral bottom of another country, and coming to the port of the claimant of the cargo. I have taken some time to consider this case, because it is a case of great value, and has been very laboriously argued; and because, as I understand, there are other cases of a similar nature which are likely to come before the Court; and it may save time to deliver the opinion of the Court on what

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will be the effect of similar evidence and similar circumstances in those cases also, if they occur.

In considering this case, I am told, that I am to set off without any prejudice against the parties, from any thing that may have appeared in former cases; that I am not to consider former circumstances, but to suppose every case a true one, till the fraud is actually apparent. This is undoubtedly the duty in a general sense of all who are in a judicial situation: but at the same time they are not to shut their eyes to what is generally passing in the world—to that obvious system of covering the property of the enemy, which, as the war advances, grows notoriously more artificial: higher prices are given for this secret and dishonourable service, and greater frauds become necessary; old modes are exploded as fast they are found ineffectual, and new expedients are devised to protect the unsound parts better from the view of the Court. Not to know these facts as matters of frequent and not unfamiliar occurrence, would be not to know the general nature of the subject upon which the Court is to decide; not to consider them at all, would not be to do justice. The very nature of the enquiry necessarily suggests something of this kind; for the enquiry is to see, whether the property does, *bona fide*, belong to those, who are ostensibly represented to be the proprietors. It is an enquiry, therefore, which is necessarily attended with some doubt *in limine*. No reasonable man will say, that the Court is to look at cases in the same manner where no special reason for fraud exists, and where the enemy is driven to it by a necessity that is notorious, as the only means of getting home his property; and when
such

such artifices are not unfrequently known to prevail; and more especially, when the persons appearing as claimants have been exposed to the experience of the Court, as having engaged in such a trade, and do not stand before the Court with those general credentials which belong to the conduct of a pure and unimpeached neutrality. I am afraid the observation of those who attend this Court will apply these remarks to the owner of the ship. The claimant of the cargo has not, in my recollection, appeared before the Court on any former occasion. I do not say, that the conduct of the owner of the ship will in general affect the cargo; but if the parties appear bound up together in an intimate connection and co-operation in measures which a Court cannot see without disapprobation, such a concurrence cannot but form a foundation for the unfavourable reception of the case of a party so connected in that transaction.

The case sets off in a manner attended with much suspicion; the ship is a *Danish* ship, asserted to have been purchased on a voyage from *Riga* to *Bordeaux*; but there is no evidence on board that points to it, except the mere recital of a bill of sale. The first evidence that we find respecting the vessel, represents her as lying in a *French* port; and the master cannot say any thing of the purchase, or of the built, or former employment of the vessel; he being, according to his own account, not acquainted with her. The carpenter, however, and the second mate describe her as *French* built. The master and the whole crew were sent to *Bordeaux* to take possession of the ship, although she is represented as a neutral vessel before; and the former crew, though neutrals, are not

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not employed, except in one or two instances, in consequence of the illness of some of the new crew.—Who is the master? He is represented as a *Prussian*; but in a paper invoked from the *Julie*, he appears to have been habitually trading from *Bordeaux*; and I think I may infer, habitually trading to the *Isle of France*; because the letter of recommendation which he carries with him, speaks of him as an (a) old acquaintance, and as a person not unknown *there*. There is the old measuring bill on board, which, if it applies to this ship, describes her as a *Danish* ship; but how this came to be detained alone, and no other papers, does not appear; the fact is however, that the ship is first produced to the notice of the Court, lying in a *French* port, and with a new crew; and the master unacquainted with her former history. I cannot help thinking there is an appearance of something like industry, or *astutie* used, to withdraw from the Court circumstances, of which it ought to be apprized.

With respect to the cargo, it is exposed to these general observations, that it is put on board in a *French* port of the *East Indies*, being the proceeds (for I must take all the circumstances together) of a cargo, put on board in a *French* port in *Europe*, not in return for any cargo sent from *Hamburg* to *Bordeaux*, but as an original shipment in a *French* port,

(a) Letter from a merchant at *Bordeaux*, to Mr. *Delos*, to the care of a merchant at the *Isle of France*, after mention of several letters which he had written—"Since which, I have written to Mr. *Bedel*, by a *Prussian* ship, and though the captain, *Gebhardt*, is an old acquaintance of mine, I fear he has acted with my letters as they do in general."

to be delivered at the *Ile of France*. It will be proper for me to consider also, an observation made on the circumstances under which this cargo was taken :

—The ostensible destination is represented to be to *Hamburg* undoubtedly, and it has been pressed upon me, that the place of capture, on the *English* coast near *Dartmouth*, confirms this account, and shews that the return was not to *Bordeaux*. It is not clear however, from the place of capture, that the vessel might not have found her way into some *French* port in the channel; considering the situation of *Bordeaux*, it might be thought too hazardous an enterprize to attempt to get to that port, on account of our fleets and cruizers. It is not clear therefore, from this account, that the return might not be to a *French* port; taking it however, otherwise, and supposing the destination to be to *Hamburg*, it is said to be a strong proof of the neutral property: but I think that does not amount to much, considering the circumstances of the times, and the exposed state of the *French* ports. If they were not attainable, the next best expedient would be, to get the property to a neutral port; and therefore, I think that circumstance will not weigh so much, as it might at a time, when the ports of *France* were open. So much for the observations arising on the surface of this case: I think, it is one that obliges the Court to look with some suspicion; I do not say, to employ any thing of *astutia*, in opposition to the *astutia* employed against it, (for *astutia* does not belong to a Court of justice) but to exercise its vigilance; and I think, I violate no duty, in coming to the enquiry with a certain degree of jealousy, which

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which the appearances of the case, and the general conduct of the parties have contributed to raise. The material object of enquiry, I think, will be, whether it was the intention of the parties to impose on *English* cruizers, and *English* Courts of justice, in the original shipment to *India*.—This is important, on two points; first, because as the present cargo is the proceeds of that shipment, if there is reason to presume from the fraudulent manner of the transaction, that there were *French* interests concerned in that cargo, there will be great reason to conclude that the same *French* interest have travelled throughout; and secondly, for the purpose of ascertaining the good faith of the agents; because, if I discover a deep laid artifice in the original transaction, it will be difficult to persuade me, that the parties are entitled to the credit of ingenuous dealing, in the subsequent parts of the transaction. The two leading facts are, that the ship went from a *French* port to a *French* settlement; and that the cargo was there disposed of, in the *French* colony. To prevent these acts from being considered as fraudulent, one of these two things must be shewn; either, that the destination was avowedly and openly professed (for in such a case, although the trade might be held illegal, it would not be fraudulent); or secondly, that if the ship did not go with this avowed destination, she went thither under some urgent and supervening necessity; because if it was the original intention of the parties, and that intention was dissimulated, it must be considered as a fraud; and that fraud more noxious, on account of the

the contraband nature of several of the articles of the outward cargo (a).

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On the first point, an open and avowed destination to the Isle of *France*, there can be no dispute; as every paper points to *Tranquebar*, and to no other place; except the certificate granted at *Hamburgh*, on the oath of Mr. *Baker*, which is referred to, as stating a destination to the Isle of *France*; but, unless that can be proved to have been on board in the outward voyage, in a producible form, it might as well have been a thousand leagues off; and if it was not, there is nothing to shew even a contingent intention of going to the Isle of *France*; and therefore, the destination must be deemed dissimulated. That the certificate was on board in a producible form, can, I think, hardly be maintained; for the master was wholly unacquainted with it, and speaks entirely of a destination to *Tranquebar*, without any reference to the Isle of *France*. That it was not produced, appears also from two instances, in which this ship was met by *English* cruizers and examined; and it is hardly credible, that if such a paper had appeared, a cruizer would so far have forgotten his own interest, as well as his duty, as not to have brought the vessel in for adjudication. I am therefore forced to conclude, that this paper could not be on board in any form that

(a) The general cargo consisted of a large variety of assorted articles, amongst these—9 cables and 26 small ones, 6 kedge anchors, 704 bars of iron, 163 bundles of hoop, round and square iron, 6 casks of ship tar, 200 casks of pitch.

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made it producible as a ship's paper, during the voyage.

This brings me to the second point, whether the vessel was driven to unload in the Isle of *France*, by any emergency arising out of the circumstances of the voyage? It is said, that the parties had a right to clear out for *Tranquebar*, reserving to themselves a liberty of touching, in this manner, at an enemy's port, for the purpose of refreshment: But *I* say, that if there is such a reservation, it ought to be expressed in the ship's papers; it can least of all be admitted in a case where every thing points to a neutral port; where the consignee is regularly described; and where every attestation, and oath in the case, points to a neutral port only. As to any plea of necessity that can be set up to justify such a deviation, there must be two necessities shewn, one creating an obligation to go into that port, and the other, an obligation to sell in that port; for this last is the criminal act, constituting the fraudulent departure from the intentions which are held out in every paper in the case. It is said, that this deviation was occasioned by a want of water, and the leaky condition of the ship: the experience of the Court, does not induce it to hear these excuses with any great respect; especially when there is no intimation in the papers of any such deviation. It does not appear at what time the failure of water was perceived, whether before the ship reached *British* ports or not; or whether due diligence was used to supply it; therefore, of this I cannot judge. But of damage done to the ship, I see very little; and that, not till she approached very near the Isle of

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France; that there was any leakage, I do not find in any part of the journal; and in respect to one passage, in a paper relied on, I am convinced by looking to the original, that it refers only to the sea breaking in at one of the port holes; and that no damage had been sustained in the body of the ship. It is still farther proved, by the nature of the very slight repairs which the ship underwent at the Isle of *France*; but giving them the full benefit of this pretence, does it follow that the ship could not have proceeded to *Tranquebar*?—On this point, I have the best witness in the world, the carpenter, who says, “she might have gone on; that the repairs might easily have been made, and water supplied, and four or five Lascars easily procured, in the place of some of the sailors who were ill;” (whose illness is represented as a general sickness of the crew, affording another pretence for this deviation). Then, as to necessity of *selling* the cargo at the Isle of *France*, I do not see that it is even pretended; it is only said, that the opportunity of a better market presented itself. Now, on this part of the case, it may not be unnecessary to look to the authority under which the sale took place; because, if it was done by the master, without any authority from the owners, it might be too hard to press the fraudulent conduct of the master, in respect to the cargo, to their disadvantage. What says the master? He speaks indeed to this effect, and does not pretend to have had any dominion over the goods, but admits himself to be a mere carrier master; and to have taken on himself to dispose of these goods, without the privity or direction of the owner.—But is this true? It is admitted, because it cannot be denied that there had been an actual authority over this vessel previously

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viously lodged in Mr. *Saulnier*, who appears to have been the great manager of frauds at this place, in the same character in which Mr. *Wilkins Andre* has appeared at *Surinam*. The authority of Mr. *Saulnier* is signed before the master leaves *Europe*; yet he represents himself to be entirely ignorant of it; so that on the claimant's own shewing, the case stands thus—That if by any accident the ship should come into the Island of *France*, there was an authority given to sell the cargo, and take in another for *Europe*; yet the master received no intimation of these orders; and when at last he actually proceeds to sell the cargo, he does it on a mere speculation of his own, without any authority from *Europe*.

Looking no farther, it is impossible not to come to a conclusion on this part of the case, that it was a fraudulent transaction; for taking it at the weakest, there was a possible contingent sale at the Isle of *France* provided for, without any appearance of such a purpose in any of the papers; but is not the Court bound by all fair rules of evidence to go farther, and to ask, whether the intention was not *entirely confined to the Isle of France*, without any view to *Tranquèbar*, except for the purpose of covering the real nature of the transaction? It has a right to infer this, and to presume every thing against a case, in which so evident a suppression of a material truth has already appeared; and this suspicion is still farther confirmed by the other circumstances of the case. In the first place, we find that the authority was signed at *Hamburgh*, before the sailing of this vessel; yet the master is left in entire ignorance, to be surprized with the first view of these instructions, on his arrival in the Isle

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Isle of *France*: Is it nothing, that it is a shipment from *Bordeaux*, ostensibly to *Tranquebar*? Is the communication between those ports so open, and so much in the ordinary course of trade, as to afford no ground for suggesting, that it was from the beginning, a false and colourable destination? and for supposing that the vessel would not reach *Tranquebar*, without first finding her way into a *French* settlement? more especially, after it *has* appeared, that this fact did actually take place. Again, there is a letter from Mr. *Saulnier*, to the shipper of the outward cargo at *Bordeaux*; shewing, that they were in the habit of sending backward and forward to each other. Is it not natural to expect, that the master would have written to his employer, informing him of the necessity that he was under, to deviate into a *French* port, contrary to his destination; and to sell his cargo there? He is directed "to write on his arrival at *Tranquebar*, that half of the freight might be paid."—Would he not feel the same necessity for writing, from the Isle of *France*? Yet, if I understand the master right, he says, on the 23d interrogatory, that he has not written any letter to his employers.—Who is the master? He appears evidently by the letters, to be a person well known at *Bordeaux*, and to have been employed in the *Bordeaux* trade, to the Isle of *France* and other *French* settlements. What has been the conduct of the master? It is said, and truly said, that in various parts of his evidence, he is a gross falsifier, so, as effectually to discredit his own testimony. But will this stop here? I apprehend not; it goes much farther, and extends to the character of his employer; for where a master prevaricates so grossly as this

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this man does, I cannot suppose that he would be a voluntary falsifier; or, that without an interest, or without instruction or subornation, he would lead himself into such a labyrinth of fraud. I cannot help thinking that the conduct of this master has been such, as will reasonably affect the credit and the property of his employers. The very celerity with which the sale is conducted, is, in my apprehension, a strong circumstance to shew, that he went out privy to the intention of disposing of his cargo at the *Isle France*. The very next morning after his arrival, he comes to the resolution of selling his cargo—Was it not natural that he should at least have taken time to reflect whether it was possible to go to *Tranquebar*? would he, at the very instant almost, a few hours after his arrival, have come to the resolution to sell there; in violation of his own engagement, and of the instruction of his owner, unless he had set out with some secret order to that effect. The letter of authority is not produced; but it is said, the parties are ready to produce it; and I have no doubt of it: The very celerity with which the business was transacted, leaves me no reason to suppose, that the persons who were concerned in it, would leave that master-stroke of fraud unexecuted; and it is very probable, that they might suppose, it would come with more credit, if called for in this manner, than if it had appeared originally among the ship's papers. The letter of Mr. *Henricksen*, gives us reason to conclude, that the same bye conveyance which carried the instructions to *Saulnier*, would carry directions to him, respecting the best manner of supporting the whole

whole of these fabricated proceedings, in case it should be wanted.

Taking all the parts of the transaction together, I have a well grounded conviction that the Isle of *France* was the original destination; and that there was a fraudulent suppression of that circumstance: Then who were the parties to this fraud? The owners of the ship, and of the cargo.—The instruction to *Saulnier*, must have come from the owners of the cargo; and it is impossible, that the owner of the ship should not have been apprized of so material a deviation from the terms of the charter-party; besides, the master is the agent of the owner of the ship, so as to bind *him*; and it is hardly credible, that he could have undertaken so material a variation without a full assurance that he would be supported in it.—As to saying, that this part of the voyage was a past transaction, I must deny that; for it is an entire contract, of which, one part is, that the returned cargo should be taken in at *Tranquebar*. It is not a detached voyage, commencing without any connection with the outward cargo; but it is one entire transaction, of which the former part links in with that which is to follow:—a transaction, which is false in two of its terms; false in the original destination, and false in the representation that the returned cargo was to be taken in at *Tranquebar*. If this is the case, the legal conclusion will be at no great distance; because, if the proof of property in this case is not sufficient, the parties have forfeited the right of supplying farther evidence; and they must stand or fall by the original evidence of the case.

With respect to the ship, she appears first in a

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French port, for I cannot take the mere recital of a purchase, as any proof; the pass is not on the oath of the owner, but on the master, who knows nothing of the transfer; and when I look at the contract of sale, it appears very unnatural that some part of the money should be paid before hand, whilst the ship was *in itinere*; and under a condition, that the money should be returned with an interest of four *per cent.* if the vessel did not arrive. Certainly, this is not a very common mode of transfer; and I think I can see a reason why the payment is put forward in this way; because if no money had been paid, it might be thought, that this Court would not consider it as an executed sale.—That a merchant should actually advance money on such terms, when so much better interest might be made, is not very natural; it is certainly not the habit of that body of gentlemen to do so; and this objection is still farther confirmed by the terms of the attestation:—“as long as the vessel shall continue in our employment.” It is an attestation merely present, and every thing points to a suspicion, that there was merely a temporary shifting of interests, and a *handing over*, in this asserted transfer; and if it was before, a *Danish* ship, one need not look far to find a reason for this; because, if a cargo was to be carried to the Isle of *France*, of the nature of contraband, it might be a very hazardous adventure for a *Dane* to undertake, as expressly prohibited by his own treaty.—This supposition is still farther aided by the instructions given by the owners to the master; for without any probation, (and with so little acquaintance between them, that the master does not know the form and style of his employer’s house of trade,

trade (a), they bind themselves down "to employ him as long as the vessel shall continue in their possession." That they should bind themselves in this manner to a mere stranger, is not very probable;—whether it is in a *French* or *Danish* interest, it is not necessary for me to enquire; it is sufficient that the property is not proved to my satisfaction, to belong to the person claiming it in these proceedings.

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In respect to the cargo:—How is that proved to be the property of Mr. *Kaster*? It is asserted in the documents, and in the same instruments that describe the outward voyage as being to *Tranquebar*; can the Court admit as complete evidence of the property, those documents, which it is bound to consider in regard to the destination, as totally false? The destination is described to *Tranquebar*: Is not that a fraud? Or is it to be allowed to a party to say, "It is true, I have been found in an untruth in this part, but in all other parts, give me the benefit of a fair claim." The inference is not, that all the other documents must be necessarily false; but it renders the truth of them questionable, certainly, in the extreme; again, in respect to the instructions to the master, do they not throw discredit on the claim for the cargo? Suppose the contract of the charter-party to have been executed for the outward and homeward voyage; would it not be natural to express it in the instructions to the master?—Is it to be said, that the master had an

(a) The master described himself in fourth interrogatory, as being appointed to the command by *Jean Bauerman* and Son, whereas the house of trade is *Hillary Bauerman*, and Son.

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opportunity of verbal instructions, and, therefore, that he was at liberty to depart from the terms of his written instructions? As far as I understand the instructions, they seem to me to refer to another transaction. The master arrives at *Bourdeaux* in *January*. The lying days, and the state by which he describes his arrival at *Bourdeaux*, do not agree. The instructions direct him to take a cargo on freight, on the part of a neutral merchant.—Would it not have been natural to have repeated the terms of the charter-party, and to have told him that he was to look to that, by which the hull of the ship was bound to Mr. *Kaster*? Instead of that, his instructions are, “to go to *Bourdeaux*, and there take a freight on the part of neutral owners.” So much for the evidence of the papers. But supposing them to be liable to no objection, in what manner are they verified? The master does not know the name of the lader; then in what way can I give him credit for what he says, that the property belongs to a person at *Hamburgh*? The numerous prevarications in which he is detected, deprive him of any right to be believed; and they will not only affect *his* personal credit, but they must fall also, in some degree, on those by whom he was employed in this transaction. With respect to the real foundation of this business, it is not perhaps very easy for me to develope it; if it is really a *Danish* ship, my own opinion is, that it has been handed over for the purpose of carrying out contraband articles to the *French* settlement; and as to the cargo, when I see the outward cargo carried to a *French* settlement, and there delivered to *Saulnier*, who is the great agent of frauds there, and with much
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contrivance; connecting all the circumstances of *French* agency, throughout the whole transaction, I cannot think that it is wholly unconnected with *French* interests: In what degree they are mixt in it I cannot say; but it is my comfort to think, that it is not necessary for me to determine that point; for if Mr. *Kaster* has *any* property in this cargo, if he has mixed his interest in any proportion with the interest of the enemy, and resorts to modes of prevarication, to conceal and protect the enemy's interest, such a conduct will affect his own share.—If neutrals will not bring their claims fairly and ingenuously before the Court, but resort to such artifices to cover and protect the property of the enemy, it is a rule of the law of nations, that they shall be concluded by the proof they bring. I shall therefore, not decide this case in the affirmative ground, that this ship and cargo are proved to belong to the enemy; but on the ground, that the property in them, is *not proved* to belong to the persons claiming them before this Court; and, that if it is their property, they have cloathed it with such circumstances, as justly exclude them from the opportunity of giving farther proof. I wish neutrals to understand, that if they mean to avail themselves of the rights of neutrals, they must conduct themselves as such. It will then be the duty of this Court, and the ambition of it, to exert its utmost vigilance to give them the benefit of their neutrality. But on the other side, if they discredit their cases by a cloathing of prevarication and falsehood, who is to blame for the inconveniency that may ensue? The rule of this Court is, and framed with as much moderation surely as the subject will admit, that if their proofs, dishonored

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by such impure mixture, are nevertheless sufficient to establish the truth of their claim, it is well; but if they fall short of this, (and it can hardly happen otherwise), they shall not be indulged with the means of supplying proofs from sources which have appeared to be corrupt.

Ship and cargo condemned.

Laurence—Submitted it to the consideration of the Court, whether it would not be proper to make some alteration in the ordinary form of the sentence. That in this instance, it would express the direct contrary to what the Court intended to deliver as the grounds of the decree.

Court—It is not in my power to alter the form; it has been under the consideration of the Superior Court, and they have declined to do it.

Laurence—I was not aware that it had been under the consideration of the Superior Court. The inconvenience arising from the usual form is, that although we understand the terms as so general and comprehensive, as to extend also to other grounds of decision, than those specifically mentioned; other Courts, which have frequently occasion to interpret these sentences in case of insurance, &c., bind down the cause of condemnation to the terms of the sentence.

Court—I shall be very willing to give any relief in my power.

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The Registrar said, That there had been certificates given, in one instance by himself, with which another Court was satisfied.

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THIS was a case of an *American* ship, taken on a voyage from *Marble Head* to *Bilboa*, 16th October 1799, with a cargo of fish, sugar, and cocoa: the ship had been restored.—With respect to the cargo, it was said on the part of the captor, that it was a case of farther proof; that it appeared from the deposition of the mate, that the sugar and cocoa had been brought from the *Havannah* to *America*, and from thence sent on for *Spain*; from which a suspicion must necessarily arise, of *Spanish* interest; that, if it was even neutral property, a question of law would arise, whether such a trade was not to be considered as a direct trade between the colony of the enemy and the mother country. It was farther said, that the mate had deposed, that the master had confessed to him, that he had destroyed some papers, which of itself would subject the claimant to the necessity of making farther proof.

Colonial produce of the enemy imported into *America*, and afterwards sent on to *Spain*: legality of such a trade, on what considerations depending: Restitution.

On the part of the claimant, it was said, That the principal part of the lading consisted of salt fish, for the *Spanish* market; which made it extremely desirable that it should be set at liberty, in order to prosecute the voyage before the beginning of *Lent*. That it was not in the power of the claimant to take the cargo

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cargo on bail, by submitting to farther proof, as the correspondents of the owner in this country had refused to take the cargo on bail. It was therefore pressed that the case might be heard on the original evidence; which was said to be very full and satisfactory, and sufficient to obtain immediate restitution. In respect to the transshipment, it was said to have been of but a small quantity of cocoa; that the sugar was part of a whole cargo, which this vessel had brought on a former voyage from *Havannah* to *Marblehead*; that as to the suppression of papers which the mate spoke of, it was doubtful what was the nature of the papers; and that it was the act of a man who was insane, and had since destroyed himself.

Court—As there has been a spoliation of papers, and as the account given of that act is but conjectural, it must be a case of farther proof. It might be an act of insanity in the master only, but that must be made out in proof. It is impossible for the Court to relax the rule, that where there has been a suppression of papers, there must be farther proof.

29th *April* 1800 this cause came before the Court again on farther proof.

For the Captors, the King's Advocate and Arnold—When this cause first came on, it was contended that farther proof could not possibly be demanded; but now it appears that the parties themselves were aware of the difficulties of their case, and had actually sent for farther proof from *America*, before the Court ordered it; the transaction which now discovers itself in the farther proof, gives rise to a question

question on the property, and a question on the legality of the trade. It appears that the asserted purchase at the *Havannah* was made partly by bills, drawn on the *Havannah* by *Gardoqui*, of *Bilboa*, and partly by bills drawn at the *Havannah* by the purchaser on this house in *Spain*; that part of the cargo, the sugar, being the produce of the *Havannah*, was carried by this very ship in *June* 1799, to *America*, and there, after some repairs done to the ship, re-shipped for *Spain* in *August*; and the cocoa also was originally brought from a *Spanish* settlement of *Lagaira*, and transhipped from another schooner lying at *Marblehead* in *America*, under an original destination to *Europe*. Supposing this to be a trade between the colonies and the mother country, this mode of communication is natural and intelligible; but if it is considered as the foundation of the acquisition of this property by persons in *America*, it is quite otherwise, and is utterly improbable. It is said, that the owners had received these bills in payment for cargoes sold in *Spain*, but it is still not credible that they should take bills of this nature, drawn on persons, in a colony, not generally open to foreign trade. The sequel is of a similar complexion; the instructions of the master on this voyage are, "to go to *Bilboa*, and if you meet with no one who will do your business better, to apply to *Gardoqui* and Co." from which it is evident that they were deeply involved in the whole transaction. There is also the account current which Mr. *Gardoqui* sent to *Hooper* in *America*, in which he debits *Hooper* for two bills on the *Havannah*, at 5 per Cent. on the said bills, and with his *Gardroqui's* remittances
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in four bills, on the *Havannah*, and 5 *per Cent.* on them, with acceptance of bills drawn on him at the *Havannah*. Yet afterwards he credits Mr. *Hooper* with 12 *per Cent.* on the two bills (on the *Havannah*) probably for neutralizing this cargo. He credits *Hooper* also for the former cargo by Captain *Laskey*, so that the whole of this adventure would appear to be at the risk of *Garδοqui* and Co. It is said in an affidavit of 17th *March* from Mr. *Afa Hooper*, who is a gentleman speaking from a distant remembrance of the transaction only, and is not himself connected with the business, "that he was informed at the time this transaction took place, that the duties were paid and the goods landed," but there is no trace of that in proof, nor in the affidavit of Mr. *R. Hooper*, the claimant, and his sons, nor does it appear that the goods were entered for the *American* market; they came from a *Spanish* colony, and were landed whilst the ship underwent repair, that she might prosecute her farther voyage across the *Atlantic* to the mother country of the colony. Taking these circumstances all together, this defect of proof, the suppression of papers, and the extraordinary nature of the bills of exchange; there is every reason to believe that this cargo is not the *bona fide* property of the claimants in *America*. But supposing it to be their property, it would still fall under the same principle that has been applied to the trade between the colonies and the mother country; it would be the most nugatory thing in the world to say that that trade, which is not allowed to be carried on direct, should become legalized or allowable by a mere transshipment in *America*. In the cases of the *Mary, Star*,
which

which was a trade of a similar nature between *Surinam* and *Holland*, the ship and cargo were both condemned.

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[*Court*—Is it contended that an *American* might not purchase articles of this nature and import them, *bona fide*, to *America* on his own account, and afterwards export them?]

It was answered—No, that was not contended; but that the truth and reality of the importation for his own account was the point in question; that all the circumstances in the case pointed to a near connection with *Spanish* interests; and that no proof was brought of the payment of the duties in *America*, nor that the transaction was in any way conducted like a *bona fide* importation for the *American* market.

[*Court*—It seems to me, that this is the material point, and that it is left so bare, that it is almost useless to examine the other facts till that is established; and that it would be better to reserve the whole case till farther information is produced on that subject.]

For the Claimants, Laurence—The Court will perhaps not think it necessary to make that a preliminary question in the present case, if it considers the nature of this cargo, and the circumstances attending it. The principal part of the cargo is fish, to the amount of 1800 quintals; on which no question respecting the legality of the trade is raised; of the remaining part, consisting of sugar and cocoa, the sugar is but a small parcel, taken for the purpose of making up the lading; and the cocoa is positively
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certified under the hand of the collector of the customs at *Marblehead*, to have been imported into *America*, and to have been entered at his office 17th Aug. 1799. The same certificate also states the sugars to have been entered at his office in June 1799; and it is sworn by Mr. *Asa Hooper*, "that he saw several parcels of them in the warehouse of the claimant, Mr. *R. Hooper*, and that he understood they had all paid the duties." If the owners have not given full and entire information on that fact, it is hoped, the Court will not think it unreasonable that slighter evidence may be admitted in respect to these articles, making so small a part of the cargo, than if the whole, or the principal part of the cargo had been exposed to the same objection—as to the property, one circumstance alone is almost sufficient, viz. that the ship was furnished with a letter of marque against *France*; it is not probable that the *Spanish* owner would have chosen such a vehicle for the conveyance of his property, since that circumstance alone would have made the whole liable to condemnation by the law of *France*.

JUDGMENT.

Sir *W. Scott*—This is the case of an *American* vessel, taken on a voyage from *Marblehead* to *Spain*, with a cargo of a mixt nature, consisting of fish, sugar, and cocoa. The ship has been restored, therefore the only question that I have to consider is respecting the property of the cargo, and the legality of the voyage. On the former hearing, it appeared to be a case of farther proof, as the cargo was the produce of a *Spanish* colony, taken on a voyage to *Old Spain*; and as the master had withdrawn some of the papers, and had indeed

destroyed himself before his deposition was taken; it would therefore be a little extravagant to contend that such a case was not a case of farther proof. I do not however, impute it to the parties, as any diffidence in their own case, that they had sent for farther proof before the cause came on. They might think that some difficulties would arise, and it was but a measure of prudence to be prepared with farther proof. I am therefore not disposed to draw any inference disadvantageous to the claim from that circumstance: I am now to judge of the sufficiency of the proof brought in, and of the force of the different objections that have been made against it.

In respect to the fish, I do not think that there is any thing that affects that part of the case; it is a commerce, in which *Americans* deal largely for the supply of the Southern countries of *Europe*. The whole suspicion and question rests on the other parts of the cargo, the sugar and the cocoa: Now, in the first place, it appears, from Mr. *Hooper's* attestations, and also from those of his two sons, and of another gentleman of the same name, Mr. *Afa Hooper*, that this ship had made a voyage to *Bilboa* before, and had taken payment of her cargo in bills on the *Havannah*. It is objected that this is an extraordinary mode of payment; and so it would be, for a person, not being in any course of connection with the *Havannah*; because they would be to be disposed of by a discount, or other disadvantageous means. But it appears from Mr. *Hooper's* attestation, that he had been in the habit of carrying on a commerce with *Old Spain*, and also with the *Havannah*; therefore it might not be attended with any inconvenience

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to him; other parts of the cargo were paid for, it is said, by bills drawn on Mr. *Gardoqui* from the *Havannah*, a mode of payment not very natural: but still, if Mr. *Hooper* was much in correspondence with this house, (as it appears he was, from the accounts current and the correspondence between them, in respect to other cargoes), I do not see that it might be more than such a mutual accommodation, as might take place in a fair transaction of this sort. Taking him, therefore, to have been a person connected with Mr. *Gardoqui*, there is nothing so alarming in this mode of payment, as if the claimant had been a person not engaged in such habits of trade before; and on the supposition, that Mr. *Gardoqui* was his correspondent, it is no extravagant thing at all, that he should be made his consignee in *Europe*. This circumstance has been pressed against the truth of the claim; but on the considerations which I have stated, I do not think it weighs materially to its disadvantage; and, considering it as connected with the former evidence, and the attestations of the claimant, I think there is no reason to doubt that the cargo is the property of Mr. *Hooper*.

Then there remains only the question of law, which has been raised, whether this is not such a trade as will fall under the principle that has been applied to the interposition of neutrals in the colonial trade of the enemy? on which it is said, that if an *American* is not allowed to carry on this trade directly, neither can he be allowed to do it circuitously. An *American* has undoubtedly, a right to import the produce of the *Spanish* colonies for his own use; and after it is imported *bonâ fide* into his own country, he would be

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be at liberty to carry them on to the general commerce of *Europe*; very different would such a case be from the *Dutch* cases, in which there was an original contract from the beginning, and under a special *Dutch* licence, to go from *Holland* to *Surinam*, and to return again to *Holland* with a cargo of colonial produce. It is not my business to say what is universally the test of a *bonâ fide* importation: It is argued, that it would not be sufficient, that the duties should be paid, and that the cargo should be landed. If these criteria are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold, that it would be sufficient, that the goods should be landed and the duties paid.

If it appears to have been landed and warehoused for a considerable time, it does I think, raise a forcible presumption on that side; and it throws it on the other party to shew, how this could be merely insidious and colourable. There is, I think, reason to believe that the sugar was *a part* and parcel of a cargo, said to have been brought from a *Spanish* colony in this vessel; and if so, the very distribution of the remainder, is some proof that they were not bought with an intention only of sending them on. But I have besides, positive proof in the affidavit of Mr. *Asa Hooper*, who swears (a), "that the duties had been paid

(a) Affidavit of *Asa Hooper* of *Marblehead*, master of the ship *Hope*, belonging to *Boston*, and now lying at *Cowes*, states, "that he had been acquainted with Mr. *R. Hooper* ever since he was a child; that he knows the brig *Polly*, and was at *Marblehead* when she sailed for *Bilboa*; and that he was informed by Captain *Lafky* and various

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paid for them." Then the only difficulty remains as to the cocoa; and it is said by one of the witnesses, and by one only, that it was transhipped from another vessel, and that it had been brought into *America* only ten days before; but although there is something of a difficulty arising on this small part of the cargo, yet upon the whole, I cannot think it weighty enough to induce me to send the case across the *Atlantic* for still farther proof, as to the facts of this recent importation and transhipment, or of its having been transferred to the present proprietors, or of its having been exported without a previous payment of import duties. If it had composed a larger part of the cargo I might have deemed it reasonable to have had somewhat more of satisfaction on some of these points, which do not appear with sufficient certainty to found any legal conclusion against it. It appears by the collector's certificate, that it had been *entered (a)* and *imported*; and I think that these words are sufficient to answer the fair demands of the Court.

other persons, that the sugar, being part of the cargo, was a part of a much larger quantity, the whole of which had been imported, landed, and *the duties paid* at *Marblehead* by the said *R. Hooper*, in the general course of trade, &c."

(s) The certificate of the collector stated, That in *June* the *Polly* entered at his office, with a cargo of 590 boxes of sugars, the property of *American* citizens;—that 17th *August*, the schooner *William* entered with 67 hogsheads, &c. of cocoa, and certified the clearing out of the *Polly*, &c. for *Bilboa*, with a cargo of 249 boxes of brown sugars, *imported* in the said brig from the *Havannah*, on the 25th *June*; and of 30 hogsheads, &c. of cocoa, imported in the schooner *William*, from *Laguaira*, with 1800 quintals of fish. Be it known, &c. that this cargo of sugars, cocoa, and fish, cleared out from this port for *Bilboa*, 27th *August* 1799, is the property of citizens of *America*, &c.

The

HIGH COURT OF ADMIRALTY.

The King's Advocate prayed—That the captors might be allowed their expences.

Laurence—Objected that the captors had materially deteriorated the cargo, by persisting to unliver the cargo, although they were told that it was unnecessary, and that the farther proof was arrived; that the cargo belonged to the same owner as the ship, and that it might stay on board the ship as a warehouse; that the commission of unlivery was a matter of form, on ordering of farther proof, but not necessary to be carried into execution in such a case as this; that the claimants, instead of being made subject to the expences, ought to be indemnified for the deterioration, which the cargo had sustained.

[*Court*—Did you object to the commission?]

Answered—That it passed in the usual course before a Surrogate.

The King's Advocate replied—That if it had been omitted, the captors would have been liable to demurrage; that the captors had been guilty of no misconduct; that the commission passed in the ordinary form without opposition; and that so soon as the objection was made on the part of the claimants, the captors desisted from the unlivery; that it was so far from being absolutely unnecessary in the present case, that two lighters of rotten fish had been taken out, which had spoiled on board.

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Court—I see nothing to affect the captors with misconduct; when the ship was brought in the claimant refused to accept the restitution of the ship without the cargo, contending, that it was not a case of farther proof. The Court determined that it was; and it does not appear that any communication was made, after the order for the captors to restrain them from proceeding to unlivery. The commission of unlivery passed as of course, and they proceeded in the execution of it till intimation was given on the part of the claimant, and on the first intimation the captors stopped their hand. I can impute no blame to the captors; and I shall give them what I was disposed to give them before the objection was taken, the expences of farther proof.

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LA ROSINE,—or the King against—Boxes of Tin.

Tin plates for
cannister shot,
put on board a
cartel ship by a
British manufact-
urer at Dover,
condemned as
Droit of Admi-
rality.

THIS was a case of several boxes of tin plates, said to be such as are used for cannistering shot, seized by order of the officers of the *Fife* dragoons, at *Dover*, on information that they had been put on a *French* cartel ship, by a brazier of that place. The ship had been detained, but was immediately released by an order from the Duke of *Portland*. On application to condemn these tin-plates as Droits of Admiralty:—

Court—There must be some witness who can prove the putting on board. It is a very serious thing to
stop

stop a cartel ship, or confiscate any thing that is on board. If they had such articles on board, without any intention of landing them, there could be no reason for stopping them. The fact of shipping them in *England* is the material circumstance to be proved. The deposition of the witness, who is a serjeant of the *Fife* dragoons, states, "that between eleven and twelve on the night of the 13th *September*, he saw sundry persons, the crew of the cartel ship, carrying boxes from the brazier's, and putting them on board the ship, which was lying near the quay, with her sails set, and ready to sail; that he broke open one of the boxes, and finding it contained tin in sheets, he immediately detained the ship, and placed sentinels on board, and went and informed his officer; that on returning he found the mayor, and that some of the officers of the customs had got on board, and had taken possession of the goods on board, and landed them, &c." This is rather too loose: He does not say the *goods in question*, but the *goods on board*. It might apply to any other goods.—But I perceive there is an affidavit, of the same person, which is more precise: It states, "that they searched the *said boxes*, and found they contained each from one to two hundred sheets of tin, &c.; and that in consequence thereof, the *said boxes*, sixty-nine in number, were immediately taken from on board the *said ship* and carried to the custom-house." On this evidence I shall condemn these boxes of tin as Droits of Admiralty.

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ORDERS OF COURT,

JANUARY 28th, 1801.

THAT no warrant of arrest, either of persons or ships, shall issue out of the Instance Court, without an affidavit of debt being previously made by the person on whose behalf such warrant is prayed, or his lawful attorney.

MARCH 13th, 1801.

THAT the cases of all ships detained in the ports, in which claims have been given, shall be brought before the Court on the two last sittings in each month, which two last sittings shall exclusively be appropriated to such cases, if they are numerous enough to occupy it entirely.

SUCH detained ships, for which claims have been given as are not brought by the captors before the Court on the said two last sittings in each month in which they shall have been brought in, shall, if they are restored at any later sittings upon the original proof, be entitled to demurrage, to be computed from the time at which they ought to have been brought before the Court, in pursuance of the former part of this Order.

*ADDITIONAL NOTE to the War Onskan, p. 300,
comprizing a summary review of French proceedings
in matters of prize during the present war.*

IN pointing the attention of the Reader to the series of facts, which have justified the change of practice, rather than of principle, that has taken place in our Court of Admiralty during the present war, in respect to the allowance of salvage on recapture of neutral property out of the hands of *French* cruisers; the Editor is happy to be able to abstain from any other observations, on the proceedings of the cruisers and the Courts of *France*, than those which are supplied by *French* writers, and those, writers of authority on this subject.

After describing the acts of violence and outrage against the *American* flag, (which is still farther evidenced by the acts of hostility which have ensued), the author of *Le dix huit Brumaire*, published at *Paris*, 1800, reproaches the proceedings of his countrymen in these terms: “ Le pavillon Danois essuya mille avanies; mais ce qu’il y a de remarquable c’est que, malgré le grand intérêt, que nous avions à ménager sa Majesté *Prussienne*, son pavillon ne fut pas plus respecté, que les autres; si elle eût voulu chercher un prétexte pour rompre avec nous, les corsaires *Français* lui en eussent offert mille, &c.—On ne se contenta pas de traiter de la sorte des puissances neutres; l’on en agit encore avec plus de rapacité à l’égard de la République *Batave*, notre alliée, notre amie;—notwithstanding the services, described at length, “ il falloit encore, que les corsaires *Français* leur enlevassent jusque dans leur eaux, jusque sous le canon de leur places, le peu de petits bâtimens, qu’ils
osoient

Vol. I. p. 286.

osoient mettre à flots,—envoyoient ils des secours en blé dans leur colonies pour les substantier, et empêcher par là qu'elles ne se livrassent à l'Angleterre faute de vivres, des armateurs Français interceptoient ces convois, et les faisoient déclarer de bonne prise, à la faveur des loix vexatoires rendues en cette matière, et dont l'application étoit souvent prononcée, dans certains tribunaux de départemens, par des juges, qui avoient un intérêt dans les armemens en course." p. 168. 170.

If such were the proceedings of the *French* cruisers, and *French* courts of justice; it will be found that the frequent change, or rather confusion which has taken place in *France*, with respect to the prize jurisdiction during the present war, has been but ill adapted to correct the abuse. One of the first acts of the revolution was to dissolve all possible connection between the executive power of the state and the administration of justice; and no distinction was made between the ordinary administration of laws between citizen and citizen, and the administration of a branch of law which is, in some respects, *sui generis*; the public law of prize, administered to foreign states, in time of war, on the authority of general principles of equity, the immemorial usage and customs of the sea, and the express treaties subsisting with particular countries.

The first article of the law of 13th *August* 1791, had given to the Tribunals of Commerce a general civil jurisdiction over all questions of commerce, reserving, or as it is expressed, "without including for the present, the jurisdiction over prize matters." *Code des Prises*, 1799, v. 2. p. 125. Notwithstanding this reservation, many prize cases were carried before those tribunals immediately on the issuing of reprisals on the part of *France*, 31 *Jan.* 1793; although it was not till the 14th *Feb.* that a provisional decree passed, giving them authority in prize matters, *ibid.* On the 21st *February* another decree passed, justifying every thing that had been done by those tribunals on the subject of prize, previous to the 14th *February*; and declaring them, "to be rightly seized of the prize jurisdiction, and authorized to judge definitively on such cases." *Ibid.* On the 1st of *October* 1793, a farther modification took place; and the jurisdiction was given, "aux juges de paix pour l'instruction, [taking examination, &c.] et aux tribunaux de commerce pour le jugement." On the 8th *Nov.* 1793, a still more important change was made; the decree
of

of the 14th Feb. was expressly repealed, and a jurisdiction over all prize causes was established, to be exercised "par voie d'administration, par le conseil exécutif provisoire." *Ibid.* p. 125.

The Editor of the new code *des Prises* observes on that decree, that it was in one respect most absurd; as it repealed the regulation of the 14th Feb. which was only provisional, and left unnoticed the law of the 1st of October, which was definitive, to the same effect; and he adds, "quoiqu'il en soit de cette confusion, ou de cette contradiction des lois, celle du premier Octobre 1793 est restée dans toute sa force, malgré cet étrange décret postérieur du 8 November 1793, et nous la rapporterons toute entière à sa date, comme formant encore actuellement la loi principale sur la compétence des Prises." *Ibid.* p. 126.

However, the power which was given to the executive council by this decree, continued to be exercised, on the suppression of that board, by the Committee of Public Safety; till the law of 3 Brumaire, an 4, (24th October 1795), confirmed by the law of 8th Floreal, (27th April 1796) gave the jurisdiction of prize again to the ordinary tribunals. *Code des Prises*, v. 2. p. 382. The jurisdiction as it was at that time established may be thus described: The courts of first resort were, the Tribunals of Commerce, or the Courts of the Consul, or Vice Consul, in foreign parts, as equivalent to the Tribunals of Commerce; from these Courts there lay an appeal to the Tribunals of the Departments. *Code des Prises*, v. 2. p. 254. and in all cases there was a power of appeal to the Court of Cassation, on points of form or of mere law.

With respect to the proceedings under this changeable system, we must believe, on the word of the Editor of the new *Code des Prises*, (who was also an official person in the Court of Cassation), that during the time of the Convention, there was no stability or consistency to be found in them; and he dates the commencement of a better order of things only from the commencement of the constitution of the third year [1795]. "A compter de ce moment seulement, on voit enfin paraître dans cette partie, des lois stables, et à peu-près complètes. Tout jusqu' alors, s'était ressenti de la tourmente révolutionnaire." We find, however, so late as 22d Nivose, an 7, (11th Jan. 1799), that the Executive Directory

were by no means satisfied with the state of the prize jurisdiction, but were projecting other changes. After a clear and detailed account of the *true* interests, and it may be added, the only one real principle of *France*, in the management of prize matters, all summed up in this short and instructive sentence—" *a mieux apprécier les droits des nations neutres, et à sentir que tout ce qui serait fait pour elles, serait un coup porté à l'Angleterre* : " they conclude their memorial to the Council of Five Hundred, with these words, " Le Directoire Exécutif regarde donc qu'il est de son devoir de vous inviter spécialement à revoir la législation de prises, et à décider au préalable, come base essentielle, que dès ce moment, les contestations sur le fait de la validité des prises, seront en dernière analyse, terminées administrativement." *Code des Prises*, v. 2. p. 379, 390.

The note which the Editor of the *Code des Prises* subjoins to some of the representations of abuse contained in this memorial, is too instructive to be omitted. " Voilà justement ce qui fait, que dans les contestations actuelles sur les prises, chacun applique à tort, et à travers à sa cause, les anciens réglemens, sans s'inquiéter de ceux abrogés, ou de fait, ou tacitement, par les réglemens postérieurs; l'armateur, et le capturé prennent réciproquement dans chaque règlement ce qu'ils croient leur être utile, et laissent à l'écart ce qui peut leur être contraire. Les Juges eux-mêmes ne savent le plus souvent, à quoi s'en tenir."

It is certain that the Executive Directory did not succeed in their attempt to introduce a farther change;—and it is to their failure, that the publication before mentioned, *Le dix huit Brumaire* refers, it is apprehended, in these words—" En vain plusieurs membres du directoire voulurent ils eux mêmes faire changer la législation sur les neutres;—tout fut inutile; Le corps législatif alloit son train.—Beaucoup de députés en participant à l'émission de semblables décrets, ignorant la manière dont se faisoit la course, croyoient faire du bien à la République, et ne tuer que le commerce Anglais. Enfin parmi ces Députés, (et ceux-ci c'étoient les meneurs, c'étoient ceux que proposoient les loix), il y en avoit que étoient corsaires eux-mêmes, que avoient des bâtimens en mer, ou qui avoient des intérêts sur les corsaires.—On sent si ces hommes intéressés aux captures se soucioient beaucoup de ménager les puissances neutres ou alliées!—Ajoutons à cela comme nous l'avons déjà

déjà fait pressentir plus haut, qu'il y avoit dans certains Tribunaux qui jugeoient de la validité des prises, des juges qui avoient eux mêmes des interets sur les corsaires, et par conséquent sur la cargaison, dont ils prononcoient le relâchement, ou la confiscation."

P. 171 & 2.

This is the short history of the general effect of the French proceedings in matters of prize; extracted from their own writers, and presenting no inadequate cause for all those acts of violence and shameless rapacity under which the different nations of Europe have notoriously suffered during the present war.—It would have been encroaching too much on the reader's patience to have described each separate act of violence in its proper character:—Such was the state of their proceedings till the late change, which has taken place under the present government; by which, the prize jurisdiction is again exercised, par voie d'Administratur, as it is called, or by means of a particular Court, or Conseil des Prises, established by the Consuls, 6 Germ. 8 year, 26th March 1800; in virtue of the law of 26 Ventose, 16th March, preceding.—The effect of these establishments is yet untried—Except that, as to America, they have been again suspended.

It would be improper to close this short account of the French proceedings, without noticing one very remarkable and pregnant passage in the address of the Executive Directory, before alluded to. It contains these memorable words, "Et quand il est malheureusement trop vrai, qu'il n'y a pas un seul vaisseau marchand naviguant sous pavillon Français, quel autre moyen d'exportation avons nous, que l'emploi des vaisseaux neutres?"—And the note to that passage adds, "dans la dernier état publié par les gazettes du Nord, du nombre des vaisseaux qui ont passé le Sund, depuis un an, on ne trouve pas un seul navire Français." From the acknowledgment of this state of facts, one of these two conclusions must follow—either that the French marine is entirely annihilated or suspended; or, that a considerable part of French commerce (if it still survives) is conducted under the cover and mask of neutral flags. Taking the just measure of the right of visitation and search (*against which so many objections have lately been made*) at a mean ratio, between the importance of the result to be obtained by the belligerent over the commerce of his enemy, and a reasonable attention

Code des Prises,
Vol. 2. p. 385.

to the *pre-existing* state of neutral commerce, and the convenience of carrying on that commerce, in a *legitimate, bonâ fide, ingenuous manner* ;—What representation of facts can in so few words vindicate the necessary existence of a right of search ? (without which, all pretensions over the property of the enemy would be nugatory and merely verbal)—vindicating this right of visitation on one side, on the ground of its effect in annihilating the commerce of the enemy ; or on the other, on the ground of just and necessary controul over the interposition of neutral names to protect the trade of the enemy ; if in fact *French* trade does exist in any considerable degree, without the appearance of one *French* merchantman to carry it on.

APPENDIX.

No. I.

ADDITIONAL INSTRUCTION

*to the commanders of all our ships of war, and
GEORGE R. privateers that have or may have letters of
(L. S.) marque against France. Given at our Court
at Saint James's, the sixth day of November
1793, in the thirty-fourth year of our Reign.*

THAT they shall stop and detain all ships loaden with goods the produce of any colony belonging to *France*, or carrying provisions or other supplies for the use of any such colony, and shall bring the same, with their cargoes, to legal adjudication in our Courts of Admiralty.

Vide supra,
p. 151, &c.

By His Majesty's Command,

HENRY DUNDAS.

No. II.

INSTRUCTIONS to the Commanders of our

*ships of war and privateers, that have or may
GEORGE R. have letters of marque against France. Given
(L. S.) at our Court at St. James's, the eighth day of
January 1794, in the thirty-fourth year of our
reign.*

WHEREAS by our former instruction to the commanders of our ships of war and of privateers, dated the sixth day of November 1793, we signified that they should stop and detain all ships loaden with goods the produce of any colony belonging to *France*, or carrying provisions or other supplies for the use of any such colony, and should bring the same with their cargoes to legal adjudication; we are pleased to revoke the said instruction, and in lieu thereof, we have thought fit to issue these our instructions to be duly observed by the commanders of all our ships of war and privateers, that they have or may have letters of marque against *France*.

Vide supra,
p. 151.

APPENDIX, No. III.

1st. That they shall bring in for lawful adjudication all vessels with their cargoes that are laden with goods the produce of the *French West India* islands, and coming directly from any port of the said islands to any port in *Europe*.

2d. That they shall bring into lawful adjudication all ships with their cargoes that are laden with goods the produce of the said islands, the property of which goods shall belong to subjects of *France*, to whatsoever ports the same may be bound.

3d. That they shall seize all ships that shall be found attempting to enter any port of the said islands that is or shall be blockaded by the arms of his Majesty or his allies, and shall send them in with their cargoes for adjudication according to the terms of the second article of the former instructions, bearing date the 8th day of *June* 1793.

4th. That they shall seize all vessels laden wholly or in part with naval or military stores bound to any port of the said islands, and shall send them into some convenient port belonging to his Majesty, in order that they, together with their cargoes, may be proceeded against according to the Rules of the law of nations.

By his Majesty's command,

HENRY DUNDAS,

No. III.

INSTRUCTIONS *for the Commanders of our ships of war and privateers, who have or may have letters of marque against France, Spain, or the United Provinces. Given at our Court at Saint James's, the twenty-fifth day of January 1798, in the thirty-eighth year of our reign.*

Wide supra,
p. 151.

GEORGE R.
(L. S.)

WHEREAS by our former instructions to the commanders of our ships of war and privateers, dated the 8th of *January* 1794, we signified, that they should bring in for lawful adjudication, all vessels with their cargoes that were laden with goods, the produce of the *French West India* islands, and coming directly from any port of the said islands to any port in *Europe*; and likewise all ships, with their cargoes, that were laden with goods, the

APPENDIX, No. III.

the produce of the said islands, the property of which goods should belong to subjects of *France*, to whatsoever ports the same might be bound; and that they should seize all ships that should be found attempting to enter any port of the said islands that was or should be blockaded by the arms of his Majesty or his allies, and should send them in, with their cargoes, for adjudication; and also all vessels laden wholly, or in part, with naval or military stores, bound to any port of the said islands, and should send them into some convenient port belonging to his Majesty, in order that they, together with their cargoes, might be proceeded against according to the law of nations: And whereas, in consideration of the present state of the commerce of this country, as well as that of neutral countries, it is expedient to revoke the said instructions; we are pleased hereby to revoke the same, and in lieu thereof, we have thought fit to issue these our instructions, to be observed from henceforth by the commanders of all our ships of war, and privateers that have or may have letters of marque against *France*, *Spain*, and the *United Provinces*.

I. That they shall bring in, for lawful adjudication, all vessels, with their cargoes, that are laden with goods, the produce of any island or settlement belonging to *France*, *Spain*, or the *United Provinces*, and coming directly from any port of the said islands or settlements, to any port in *Europe*, not being a port of this kingdom, nor a port of that country to which such ships, being neutral ships, shall belong.

II. That they shall bring in, for lawful adjudication, all ships, with their cargoes, that are laden with goods, the produce of the said islands or settlements, the property of which goods shall belong to subjects of *France*, *Spain*, or the *United Provinces*, to whatsoever ports the same may be bound.

III. That they shall seize all ships that shall be found attempting to enter any port of the said islands or settlements, that is or shall be blockaded by the arms of his Majesty; and shall send them in with their cargoes, for adjudication, according to the terms of the second article of the former instructions, bearing date the 8th day of *June* 1793.

IV. That they shall seize all vessels laden wholly, or in part, with naval or military stores, bound to any port of the said islands or settlements, and shall send them into some convenient port belonging to his Majesty, in order that they, together with

APPENDIX, No. IV.

their cargoes, may be proceeded against according to the rules of the law of nations.

By his Majesty's command,

PORTLAND.

No. IV.

Admiralty Prize Court.

FORTUNA, *Jacob Christian Jebesen* master.

9th May 1795.

Vide supra,
p. 370 and 176.

THE claim of *Jacob Christian Jebesen* of *Apenrade* in *Denmark*, a subject of his Majesty the King of *Denmark*, and master of the ship *Fortuna*, on behalf of himself and of *Ambrosius Henricus Lange*, and others, all of *Apenrade* aforesaid, also subjects of his Majesty the King of *Denmark*, the true, lawful, and sole owners and proprietors of the said ship, her tackle, apparel, and furniture, now detained at *Leith* in *North Britain*; in consequence of the seizure or detention of the cargo of the said ship by the Collector and Comptroller of his Majesty's Customs at *Leith* aforesaid, as set forth in the affidavit hereto annexed; and also on behalf of *Peter Pefcheir* of *Copenhagen*, merchant, likewise a subject of his Majesty the King of *Denmark*, the true, lawful, and sole owner and proprietor of the said cargo; for the said ship, her tackle, apparel, and furniture, as the sole property of *Danish* subjects as aforesaid, and for the cargo of the said ship, also as *Danish* property subject to (a) a proportion of a certain average due from the said ship and cargo arising from damage sustained by the ship, in consequence whereof he was forced to put into *Leith* as aforesaid; and for such proportion of the said average accordingly, and for all such freight, losses, costs, charges, damages, demurrage, and expences as have arisen, or shall or may arise by reason of the seizure or detention aforesaid.

J. NICHOLL.

JACOB CHRISTIAN JEBSEN.

(a) This form of Claim and Affidavit was inserted to answer the note page 170. —Being the Claim in the *Fortuna, Jebesen*, cited page 176. It may, at the same time, serve to state more precisely the particulars of that case. The general average incurred was 335*l.* 14*s.* 6*d.* The proportion, as settled between the parties, on the cargo was 241*l.* 16*s.* 4*d.* There was besides a charge for particular average on the cargo of 24*l.* 15*s.* 8*d.*—amounting altogether to 265*l.* 16*s.* 4*d.* After a deduction of 240*l.* for wheat thrown overboard and brought into the general average, there remained a balance of 25*l.* 16*s.* 4*d.* to be paid by the cargo.

It was this sum that was deducted by the registrar and merchants, from the estimate of the remaining cargo taken by Government in abatement of the price to be paid to Mr. *Pefcheir*.

APPENDIX, No. V.

No. V.

Admiralty Prize Court.

The *FORTUNA*, *Jacob Christian Jøbsen* master.

APPARED personally *Jacob Christian Jøbsen* of *Apenrade* in *Denmark*, and made oath, that he is a subject of his Majesty the King of *Denmark*, and master of the ship *Fortuna*, and that the deponent and *Ambrosius Henriques Lange* and others, all of *Apenrade* aforesaid, and likewise subjects of his Majesty the King of *Denmark*, were, and are the true, lawful, and sole owners and proprietors of the said ship, her tackle, apparel, and furniture; and he further saith, that having taken in a cargo of wheat, (the property, as he the deponent verily believes, of *Peter Peschier* of *Copenhagen*, Merchant, also a subject of his Majesty the King of *Denmark*,) he sailed therewith early in *November* last from *Copenhagen* aforesaid bound to *Bordeaux*, but that the vessel meeting with much bad weather and contrary winds, and having sprung a leak, he the deponent was forced to make for a harbour, and accordingly put into the port of *Leith* in *North Britain*, where the said cargo was unladen in order to enable the deponent to repair the damage sustained by the ship; that the said ship was accordingly repaired, and the said cargo having been stored in warehouses at *Leith* under the locks of the Collector and Comptroller of the Customs there, this deponent on the 2d of *March* last applied to the said Collector and Comptroller for permission to re-ship the same, but that such permission was refused; and that the said cargo hath been ever since detained, and is now seized and detained in the said warehouse at *Leith* under the authority of the said Collector and Comptroller; and that in consequence of such seizure or detention of the cargo, the said ship is also now lying at *Leith* unable to prosecute her aforesaid voyage; and referring to the papers hereto annexed marked from No. 1. to No. 8. inclusive, he saith that the same are the documents relating to the ship and cargo, and were on board at the time of his putting into *Leith* as aforesaid, and that the same are true and genuine; and he further saith that no person or persons being a subject or subjects of *France*, or inhabiting within any of the territories of *France*, nor their factors or agents, nor any others enemies of the Crown of *Great Britain*, had at the time of the said seizure or

9th May 1793.

Supra, p. 170.

APPENDIX, No. VI.

detention, or now have any right, title, or interest in the said ship, her tackle, apparel, furniture, or to the knowledge or belief of this deponent in the cargo of the said ship or in any part thereof; and that the claim hereto annexed is a true and just claim, and that he shall be able to make due proof thereof as he the deponent verily believes.

JACOB CHRISTIAN JEBSEN.

Same day sworn before me, J. FISHER, Surg.

No. VI.

Vide supra,
p. 171.

At the Council Chamber *Whitehall*, the 20th of *December* 1799, present the Lords of his Majesty's most Honorable Privy Council.

WHEREAS by an act of Parliament passed in the thirty-ninth year of his Majesty's reign, intituled "an act to allow the importation of *Spanish* wool in ships belonging to countries in amity with his Majesty," it is enacted among other things, that in case any ship or vessel having on board any *Spanish* wool has been, or may be detained, and it shall appear to the satisfaction of the Lords of his Majesty's Council that his Majesty's licence was granted for the importation of such *Spanish* wool before such detention, it shall be lawful for the said Lords of his Majesty's Council, and they are hereby authorized and required to order and direct the immediate restoration of all such *Spanish* wool under the aforesaid circumstances to the respective owner or owners, or proprietor or proprietors thereof: And whereas his Majesty by licence under his royal sign manual, bearing date the 24th day of *May* 1799, did authorize Messrs. *Robarts* and Co. of *London*, merchants, or their agents, or the bearer of their bills of lading, to import on board any neutral vessels from *Bilboa* to any port in *Great Britain* the quantity of *Spanish* wool and other articles specified in the bills of lading: And whereas it has been represented that the said Messrs. *Robarts* and Co. did, in pursuance of such licence, cause to be put on board the ship *Die Beurse*, *Thomas Shimells* master, being a neutral vessel, the following *Spanish* wool, viz.

128 bags of *Spanish* wool,

12 ditto ditto,

for the purpose of importing the same into this kingdom under
the

APPENDIX, No. VII.

the authority of such licence: And whereas it has also been represented that the said ship or vessel was seized by the *Telegraph* man of war; and it is alleged that the sole ground of such seizure and detention is, that such ship or vessel had on board such *Spanish* wool as aforesaid, Now under the powers and authorities vested in the Lords of his Majesty's Council by the said act, it is declared, that it has been made to appear to them that his Majesty's licence was granted for the importation of such *Spanish* wool as aforesaid; and it is ordered in Council, in further pursuance of the said act, that the said vessel, and all such *Spanish* wool as aforesaid, be forthwith liberated as far as the same would have been liable to seizure and detention in respect to the *Spanish* wool on board the same, in case such wool had been put on board such vessel without such licence having been granted as aforesaid; and the Judge of his Majesty's High Court of Admiralty is to give the necessary directions herein accordingly.

W. Fawkenner.

No. VII.

At the Court at *St. James's*, the 19th of *February* 1800, Vide *supra*,
p. 171.
present, the King's most excellent Majesty in Council.

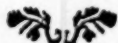
WHEREAS by an Act passed in the thirty-ninth year of his Majesty's reign, intituled "an act to allow the importation of *Spanish* wool in ships belonging to countries in amity with his Majesty," reciting that by an act passed in the thirty-third year of his Majesty's reign, to prevent traitorous correspondence with his Majesty's enemies, and by several subsequent acts, trade and intercourse was prohibited between *Great Britain* and the countries in hostility with his Majesty, unless such trade and intercourse should be specially permitted by his Majesty's licence and authority; and also reciting, that, for the encouragement of the manufactures of this country, it was expedient to permit the importation of *Spanish* wool from any place whatever in ships or vessels belonging to any kingdom or state in amity with his Majesty, it was enacted that it should be lawful to and for any person or persons to import into this kingdom *Spanish* wool from any port or place whatever, in foreign parts, in any ship or vessel belonging to any kingdom or state in amity with his Majesty, any thing in the said act passed in the thirty-third year of the reign of his present Majesty, or any other act or acts of Parliament to the contrary in anywise notwithstanding.

And

And whereas doubts have arisen, whether, according to the true construction of the said act of the thirty-ninth year of his Majesty's reign, his Majesty's subjects are thereby authorised to purchase and import *Spanish* wool under circumstances which would make the same liable to capture, as the property of subjects of his Majesty trading with the enemy, unless the licence of his Majesty should be first obtained for that purpose: his Majesty, by and with the advice of his Privy Council, is pleased to order, and it is hereby ordered, that it shall be lawful for any of his Majesty's subjects to purchase and import into this kingdom any *Spanish* wool, in any ship or vessel belonging to any kingdom or state in amity with his Majesty, notwithstanding the purchase and importation thereof may be deemed a trading with his Majesty's enemies, and notwithstanding the same might be liable to capture as the property of his Majesty's subjects trading with the enemy, in case this order had not been made.

And whereas some of his Majesty's subjects may have already purchased for the purpose of importing into this kingdom, and others may have caused to be brought to this kingdom for the purpose of importation, *Spanish* wool, without having obtained his Majesty's special licence for the same, conceiving that such licence had been rendered unnecessary by the said act of the thirty-ninth year of his Majesty's reign, his Majesty is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that in case any person or persons, being a subject, or subjects of his Majesty, hath, or have, since the passing of the said act, purchased, for the purpose of importing into this kingdom, or caused to be brought into this kingdom for the purpose of importation, any such *Spanish* wool as aforesaid, without having previously obtained any special licence from his Majesty for so doing; it shall be lawful for such person or persons to import the same, as if such licence had been previously obtained: And this his Majesty's order shall be deemed and taken to be a full and sufficient licence for the purchase, and importation of such wool, notwithstanding such purchase or importation might otherwise be deemed unlawful, as a trading with his Majesty's enemies, in case this order had not been made: And the Right Honorable the Lords Commissioners of his Majesty's Treasury, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein, as to them may respectively appertain.

W. Fawcener.



No. VIII.

INSTRUCTIONS *for the commanders of such merchant ships or vessels who shall have letters of marque and reprisals for private men of war against the ships, vessels, and goods belonging to the persons inhabiting the coasts and ports of Genoa, and the territories of the Pope, styling themselves the Ligurian and the Roman Republics, by virtue of our commission granted under our great seal of Great Britain, bearing date the twenty-eighth day of September 1798. Given at our court at St. James's, the twenty-ninth day of September 1798, and in the thirty-eighth year of our reign.*

GEORGE R.
(L. S.)

ARTICLE I.

THAT it shall be lawful for the commanders of ships authorized by letters of marque and reprisal for private men of war, to set upon by force of arms, and subdue and take the men of war, ships and vessels, goods, wares, and merchandizes belonging to persons inhabiting the coasts and ports of *Genoa*, and the territories of the Pope, styling themselves the *Ligurian* and the *Roman* republics; but so as that no hostility be committed, nor prize attacked, seized, or taken, within the harbours of princes and states in amity with us, or in their rivers or roads, within the shot of their cannon, unless by permission of such princes or states, or of their commanders or governors in chief in such places.

II. That the commanders of ships and vessels so authorized as aforesaid, shall bring all ships, vessels, and goods, which they shall seize and take, into such port of this our realm of *England*, or some other port of our dominions, as shall be most convenient in order to have the same legally adjudged in our High Court of

APPENDIX, No. VII.

Admiralty of *England*, or before the Judges of any other Admiralty Court lawfully authorized within our dominions.

III. That after such ships, vessels, and goods, shall be taken and brought into any port, the taker, or one of his chief officers, or some other person present at the capture, shall be obliged to bring or send, as soon as possibly may be, three or four of the principal of the company (whereof the master, supercargo, mate, or boatswain, to be always two) of every ship or vessel so brought into port, before the Judge of our High Court of Admiralty of *England*, or his Surrogate, or before the Judge of such other Admiralty Court within our dominions, lawfully authorized as aforesaid, or such as shall be lawfully commissioned in that behalf, to be sworn and examined upon such interrogatories as shall tend to the discovery of the truth concerning the interest or property of such ship or ships, vessel or vessels, and of the goods, merchandizes, or other effects found therein; and the taker shall be farther obliged, at the time he produceth the company to be examined, and before any monition shall be issued, to bring and deliver into the hands of the Judge of the High Court of Admiralty of *England*, his Surrogate, or the Judge of such other Admiralty Court within our dominions lawfully authorized, or others commissioned as aforesaid, all such papers, passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings, as shall be delivered up, or found on board any ship. The taker, or one of his chief officers, or some other person who was present at the capture, and saw the said papers and writings delivered up, or otherwise found on board, being first numbered and their number specified in the affidavit at the time of the capture, making oath that the said papers and writings are brought and delivered in as they were received and taken, without any fraud, addition, subduction, or embezzlement, or otherwise to account for the same upon oath, to the satisfaction of the Court.

IV. That the ships, vessels, goods, wares, merchandizes, and effects, taken by virtue of letters of marque and reprisals as aforesaid, shall be kept and preserved, and no part of them shall be sold, spoiled, wasted, or diminished; and that bulk thereof shall not be broken before judgment be given in the High Court of Admiralty of *England*, or some other Court of Admiralty lawfully authorized in that behalf, that the ships, goods, and merchandises, are lawful prize.

V. That

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41

V. That if any ship or vessel belonging to us, or our subjects, shall be found in distress, by being in fight, set upon, or taken by the enemy, or by reason of any other accident, the commanders, officers, and company of such merchant ships or vessels as shall have letters of marque and reprisals as aforesaid, shall use their best endeavours, and give aid and succour to all such ship and ships, and shall, to the utmost of their power, labour to free the same from the enemy, or any other distress.

VI. That the commanders or owners of such ships and vessels, before the taking out letters of marque and reprisals, shall make application in writing, subscribed with their hands, to our High Admiral of *Great Britain*, or our Commissioners for executing that office for the time being, or the lieutenant or judge of the said High Court of Admiralty, or his Surrogate, and shall therein set forth a particular, true, and exact description of the ship or vessel for which such letters of marque and reprisals is requested, specifying the burthen of such ship or vessel, and the number and nature of the guns, and what other warlike furniture and ammunition are on board the same, to what place the ship belongs, and the name or names of the principal owner or owners of such ship and vessel, and the number of men intended to be put on board the same, and for what time they are victualled, also the names of the commander and officers.

VII. That the Commanders of ships and vessels having letters of marque and reprisals as aforesaid, shall hold and keep, and are hereby enjoined to hold and keep a correspondence, by all conveniencies and upon all occasions, with our High Admiral of *Great Britain*, or our commissioners for executing that office for the time being, or their secretary; so as from time to time to render and give him or them not only an account or intelligence of their captures and proceedings by virtue of such commissions, but also of whatever else shall occur unto them, or be discovered and declared to them, or found out by them, or by examination of, or conference with, any mariners or passengers or of or in the ships or vessels taken, or by any other Ways and Means whatsoever, touching or concerning the designs of the enemy, or any of their fleets, ships, vessels, or parties; and of the stations, sea-ports, and places, and of their intents therein; and of what ships or vessels of the enemy bound out of home, or where cruising, as they shall

APPENDIX, No. VIII.

hear of; and of whatever else material in these cases may arrive at their knowledge; to the end such course may be thereupon taken and such orders given, as may be requisite.

VIII. That no commander of any ship or vessel having a letter of marque and reprisal as aforesaid, shall presume, as they will answer at their peril, to wear any jack, pennant, or other ensign, or colours usually borne by our ships; but that, besides the colours usually borne by merchants ships, they do wear a red jack, with the union jack described in the canton at the upper corner thereof, near the staff.

IX. That no commander of any ship or vessel having a letter of marque and reprisals as aforesaid, shall ransom or agree to ransom, or quit or set at liberty, any ship or vessel, or their cargoes, which shall be seized and taken.

X. That all captains or commanding officers of ships having letters of marque and reprisals, do send an account of, and deliver over, what prisoners shall be taken on board any prizes, to the commissioners appointed, or to be appointed, for the exchange of prisoners of war, or the persons appointed in the sea-port towns to take charge of prisoners; and that such prisoners be subject only to the orders, regulations, and directions of the said commissioners; and that no commander, or other officer of any ship having a letter of marque and reprisal as aforesaid, do presume, upon any pretence whatsoever, to ransom any prisoners.

XI. That in case the commander of any ship having a letter of marque and reprisal as aforesaid, shall act contrary to these instructions, or any such further instructions, of which he shall have due notice, he shall forfeit his commission to all intents and purposes, and shall, together with his bail, be proceeded against according to law, and be condemned in costs and damages.

XII. That all commanders of ships and vessels having letters of marque and reprisals shall, by every opportunity, send exact copies of their journals to the secretary of the admiralty, and proceed to the condemnation of their prizes as soon as may be, and without delay.

XIII. That commanders of ships and vessels having letters of marque and reprisals, shall upon due notice being given to them, observe

observe all such other instructions and orders, as we shall think fit to direct from time to time, for the better carrying on this service.

XIV. That all persons who shall violate these, or any other of our instructions, shall be severely punished, and also required to make full reparation to persons injured contrary to our instructions, for all damages they shall sustain by any capture, embezzlement, demurrage, or otherwise.

XV. That before any letter of marque or reprisals for the purposes aforesaid, shall issue under seal, bail shall be given with sureties, before the Lieutenant and Judge of our High Court of Admiralty of *England*, or his surrogate, in the sum of three thousand pounds sterling, if the ship carries above one hundred and fifty men; and if a less number, in the sum of fifteen hundred pounds sterling, which bail shall be to the effect and in the form following:—

“ WHICH day, time, and place, personally appeared

and

who submitting themselves to the jurisdiction of the High Court of Admiralty of *England* obliged themselves, their heirs, executors, and administrators, unto our sovereign lord the King, in the Sum of

Pounds of lawful money of *Great Britain*, to this effect: That is to say, that whereas

is duly authorized by letters of marque and reprisals, with the ship called the _____ of the burthen _____ of about _____ Tons, whereof he the said

_____ goeth master, by force of arms to attack, surprise, seize, and take all ships and vessels, goods, wares, and merchandizes, chattels and effects, belonging to the persons inhabiting the coasts and ports of *Genoa*, and the territories of the Pope, styling themselves the *Ligurian* and the *Roman* republics, excepting only within the harbours or roads within shot of cannon of princes and states in amity with his Majesty. And whereas the said

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hath a copy of certain instructions, approved of and passed by his Majesty in council, as by the tenor of the said letters of marque and reprisals, and instructions thereto relating, more at large appeareth. If therefore nothing be done by the said

or any of his officers, mariners, or company, contrary to the true meaning of the said instructions, and of all other instructions which may be issued in like manner hereafter, and whereof due notice shall be given him, but that the letters of marque and reprisals aforesaid, and the said instructions, shall in all particulars be well and duly observed and performed, as far as they shall the said ship, master, and company any way concern; and if they shall give full satisfaction for any damage or injury which shall be done by them, or any of them to any of his Majesty's subjects, or of foreign states in amity with his Majesty; and also shall duly and truly pay, or cause to be paid, to his Majesty, or the customers or officers appointed to receive the same for his Majesty, the usual customs due to his Majesty, of and for all ships and goods so as aforesaid taken and adjudged for prize: And moreover if the said

shall not take any ship or vessel, or any goods or merchandizes, belonging to the enemy, or otherwise liable to confiscation, through consent or clandestinely, or by collusion, by virtue, colour, or pretence of his said letter of marque and reprisal, that then this bail shall be void and of none effect; and unless they shall so do, they do all hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum of pounds before-mentioned: And in testimony of the truth thereof they have hereunto subscribed their names.

By his Majesty's command.

PORTLAND.

No. IX.

A PROCLAMATION for granting the distribution of prizes taken from the King of *Spain*, or his subjects, subsequent to the 9th day of *November* 1796, the date of his Majesty's order in Council for granting general reprisals against the ships and goods of the King of *Spain*, and his subjects.

GEORGE R.

WHEREAS, by our order in council, dated the ninth day of *November* last, we have ordered, That general reprisals be granted against the ships, goods, and subjects of the King of *Spain*, so that as well our fleet and ships, as also all other ships and vessels that shall be commissioned by letters of marque, or general reprisals, or otherwise, by our commissioners for executing our office of Lord High Admiral of *Great Britain*, shall and may lawfully seize all ships, vessels, and goods, belonging to the King of *Spain* or his subjects, or others inhabiting within any of the territories of the King of *Spain*, and bring the same to judgment in any of our Courts of Admiralty within our dominions: We, being desirous to give due encouragement to all our faithful subjects who may have lawfully seized any such ships, vessels, or goods, subsequent to the said ninth day of *November* last, or who shall hereafter seize such ships, vessels, or goods; and having declared in Council our intentions concerning the distribution of all manner of captures, seizures, prizes, and reprisals, of all such ships and goods as aforesaid, which, subsequent to the said ninth day of *November* 1796, have been, or hereafter, during the present hostilities, shall be seized as aforesaid, do now make known to all our loving subjects, and all others whom it may concern, by this our proclamation, by and with the advice of our Privy Council, that our will and pleasure is, That the neat produce of all prizes taken as aforesaid, subsequent to the said ninth day of *November* last, or which shall hereafter be taken as aforesaid, the right whereof is inherent in us, and our crown, be given to the takers, (save and except the produce of such prizes as are or shall be taken by ships or vessels belonging to our commissioners of customs or excise, the disposition of which we reserve to our further pleasure), but subject to

the payment of all such or the like customs and duties as the same are now, or would have been liable to, if the same were or might have been imported as merchandize; and that the same may be so given in the proportion and manner herein-after set forth; that is to say, That all prizes taken by ships and vessels having commissions of letters of marque and reprisals, (save and except such prizes as are or shall be taken by the ships or vessels belonging to our commissioners aforesaid), may be sold and disposed of by the merchants, owners, fitters, and others, to whom such letters of marque and reprisals are granted, for their own use and benefit, after final adjudication, and not before: And we do hereby further order and direct, That the neat produce of all prizes which are or shall be taken as aforesaid by any of our ships or vessels of war, shall be for the entire benefit and encouragement of our flag officers, captains, commanders, and other commissioned officers in our pay, and of the seamen, marines, and soldiers, on board our said ships and vessels, at the time of the capture; and that such prizes may be lawfully sold and disposed of by them and their agents, after the same shall have been to us finally adjudged lawful prize and not otherwise. The distribution shall be made as follows; the whole of the neat produce being first divided into eight equal parts.

The captain or captains of any of our said ships or vessels of war, who shall be actually on board at the taking of any prize, shall have *three eighth parts*; but in case any such prize shall be taken by any of our ships or vessels of war, under the command of a flag or flags, the flag officer or officers, being actually on board, or directing and assisting in the capture, shall have *one* of the said *three eighth parts*; the said *one eighth part* to be paid to such flag or flag officers in such proportions, and subject to such regulations, as are herein-after mentioned:

The captains of marines and land forces, sea lieutenants, and master on board, shall have *one eighth part*, to be equally divided amongst them: but that every physician appointed, or hereafter to be appointed to a fleet or squadron of our ships of war, shall, in the distribution of prizes which are or shall be taken as aforesaid, by the ships in which he shall serve, or in which such ship's company shall be intitled to share, be classed with the sea lieutenants, with respect to the said *one eighth part*, and be

allowed to share equally with them, provided such physician be actually on board at the time of taking such prizes.

The lieutenants and quarter masters of marines, and lieutenants, ensigns, and quarter masters of land forces, secretaries of admirals or of commodores, with captains under them, boatswains, gunners, purser, carpenter, master's mates, chirurgion, pilot, and chaplain, on board, shall have *one eighth part*, to be equally divided amongst them :

The midshipmen, captain's clerk, master sailmaker, carpenter's mates, boatswain's mates, gunner's mates, master at arms, corporals, yeoman of the sheets, cockswain, quarter masters, quarter master's mates, chirurgion's mates, yeomen of the powder room, serjeants of marines, and land forces on board, shall have *one eighth part*, to be equally divided amongst them :

The trumpeters, quarter gunners, carpenter's crew, stewards, cook, armourer, steward's mate, cook's mate, gunsmith, cooper, swabber, ordinary trumpeter, barber, able seamen, ordinary seamen, and marines, and other soldiers, and all other persons doing duty and assisting on board, shall have *two eighth parts*, to be equally divided amongst them.

Provided, That if any officer being on board any of our ships of war, at the time of taking any prize, shall have more commissions, or offices than one, such officer shall be entitled only to the share or shares of the prizes which, according to the above-mentioned distribution, shall belong to his superior commission or office. And we do hereby strictly enjoin all commanders of our ships and vessels of war taking any prize, as soon as may be, to transmit, or cause to be transmitted, to the commissioners of our navy, a true list of the names of all the officers, seamen, marines, soldiers, and others, who were actually on board our ships and vessels of war under their command at the time of the capture ; which list shall contain the quality of the service of each person on board, and be subscribed by the captain or commanding officer, and three or more of the chief officers on board. And we do hereby require and direct the commissioners of our navy, or any three or more of them, to examine, or cause to be examined, such lists by the muster books of such ships and vessels of war, and lists annexed thereto, to see that such lists do agree with the said muster books and annexed lists, as to the names, qualities, or ratings,

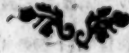
ings, of the officers, seamen, marines, soldiers, and others belonging to such ships and vessels of war, and upon request forthwith to grant a certificate of the truth of any list transmitted to them, to the agents nominated and appointed by the captors to take care and dispose of such prize; and also upon application to them (the said commissioners) they shall give, or cause to be given, to the said agents, all such lists from the muster books of any such ships of war, and annexed lists, as the said agents shall find requisite for their direction in paying the produce of such prizes, and otherwise shall be aiding and assisting to the said agents in all such matters as shall be necessary. We do hereby further will and direct, that the following regulations shall be observed concerning the *one eighth part* herein before mentioned to be granted to the flag or flag officers, who shall actually be on board at the taking of any Prize, or shall be directing or assisting therein: First, That a flag officer, commander in chief, when there is but one flag officer upon service, shall have to his own use the said *one eighth part* of the prizes taken by ships and vessels under his command: Secondly, That a flag officer, sent to command at *Jamaica*, or elsewhere, shall have no right to any share of prizes taken by ships or vessels employed there, before he arrives at the place to which he is sent, and actually takes upon him the command: Thirdly, That when an inferior flag officer is sent out to reinforce a superior flag officer at *Jamaica*, or elsewhere, the superior flag officer shall have no right to any share of prizes taken by the inferior flag officer before the inferior flag officer shall arrive within the limits of the command of the superior flag officer, and actually receive some order from him: Fourthly, That a chief flag officer returning home from *Jamaica*, or elsewhere, shall have no share of the prizes taken by the ships or vessels left behind to act under another command: Fifthly, That if a flag officer is sent to command in the out-ports of this kingdom, he shall have no share of the prizes taken by ships or vessels which have sailed from that port by order from the Admiralty: Sixthly, That when more flag officers than one serve together, the eighth part of the prizes taken by any ships or vessels of the fleet or squadron, shall be divided in the following proportions; viz. If there be but two flag officers, the chief shall have *two third parts* of the said *one eighth part*, and the other shall have the remaining *third part*; but if the number of
flag

flag officers be more than two, the chief shall have only *one half*, and the other *half* shall be equally divided amongst the other flag officers: Seventhly, That commodores with captains under them shall be esteemed as flag officers with respect to the eighth part of prizes taken, whether commanding in chief or serving under command: Eighthly, That the first captain to the admiral and commander in chief of our fleet, and also the first captain to our flag officer appointed, or hereafter to be appointed, to command a fleet or squadron of twenty ships of the line of battle, and also the first captain to our flag officer appointed, or hereafter to be appointed, to command a fleet or squadron of fifteen ships of the line of battle, (provided such last mentioned fleet or squadron shall be composed of his Majesty's own ships), shall be deemed and taken to be a flag officer, and shall be entitled to a part or share of prizes as the junior flag officer of such fleet or squadron. And we do hereby further order, That in case of cutters, schooners, and other armed vessels commanded by lieutenants, the share of such lieutenants shall be *three eighth parts* of the prize, unless such lieutenants shall be under the command of a flag officer or officers; in which case the flag officer or officers shall have *one* of the said *three eighths*, to be divided among such flag officer or officers in the manner herein-before directed in the case of captains serving under flag officers: Secondly, We direct that the share of the master, or other person acting as second in command, and the pilot, (if there happens to be one on board), shall be *one eighth part*, to be divided into three equal parts, of which *two thirds* shall go to the master or other person acting as second in command, and the remaining *one third* to the pilot; but if there is no pilot, then such eighth part to go wholly to the master or person acting as second in command: That the share of the chirurgion, or chirurgion's mate (where there is no chirurgion), midshipmen, and clerk and steward, shall be *one eighth*; that the share of the boatswain's, gunner's, and carpenter's mates, yeomen of the sheets, sailmaker, quarter master, and quarter master's mate, shall be *one eighth*; and the share of the seamen, marines, and other persons on board, assisting in the capture, shall be *two eighth parts*. But it is our intention nevertheless, that the above distribution shall only extend to such captures as shall be made by any cutter, schooner, or armed vessel, without any of his Majesty's ships or vessels of war,

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war, being present or within sight of, and adding to the encouragement of the captors, and terror of the enemy: But in case any of his Majesty's ships or vessels of war shall be present, or in sight, that then the officers, pilots, petty officers, and men on board such cutters and schooners, or armed vessels, shall share in the same proportion as is allowed to persons of the like rank and denomination on board his Majesty's ships and vessels of war.

Given at our court at *St. James's* the twenty-fifth day of *January* one thousand seven hundred and ninety-seven, and in the thirty-seventh year of our reign.



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END OF VOLUME THE SECOND.

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